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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FAITH CENTER, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the religion clauses of the First Amendment require the Federal Communications Commission to afford Faith Center, Inc., a religious broadcaster, a hearing on its claims that responding to discovery requests would violate the tenets of the church and the religious beliefs of its adherents, prior to imposing sanctions for Faith Center's refusal to respond.

2. Whether Faith Center, Inc., a religious broadcaster, could properly refuse to comply with discovery demands on the ground that they were overbroad and thus threatened the free exercise of its religious beliefs, and the beliefs of its members.

PARTIES INVOLVED

The parties involved in this petition are Faith Center, Inc., petitioner, and the Federal Communications Commission, respondent. Petitioner Faith Center, Inc. has no parent companies or subsidiaries, within the meaning of Sup. Ct. R. 28.1. Wescott Christian Center and Full Gospel Fellowship of Churches and Ministers International, of both of which Dr. W. Eugene Scott is president, may be affiliates, within the meaning of the rule.

The following individuals and corporations were parties in the court below and are respondents in this Court pursuant to Sup. Ct. R. 19.6: West Coast United Broadcasting Company, Wescott Christian Center, Dr. W. Eugene Scott, Lucille E. Johnston, and New Inspiration Broadcasting Co., Inc.*

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* As explained more fully below, this petition seeks review of two cases: District of Columbia Circuit Nos. 84-1085 and 83-2295. West Coast United Broadcasting Company was an intervenor in case No. 84-1085. Wescott Christian Center, Dr. W. Eugene Scott, Lucille E. Johnston, and New Inspiration Broadcasting Co., Inc. were intervenors in case No. 83-2295.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Faith Center, Inc., respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on May 9, 1985.[1]

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[1] This petition involves the broadcast license renewal applications of two stations, KHOF-FM, Los Angeles and KVOF-TV, San Francisco. In the court of appeals, the KHOF-FM proceeding was case number 83-2295 ("the Los Angeles proceeding") and the KVOF-TV proceeding was case number 84-1085 ("the San Francisco proceeding"). In addition, there was a consolidated case, number 84-1086, brought by an individual named Lucille E. Johnston, in connection with the San Francisco proceeding. These three cases presented similar issues and the respondent, Federal Communications Commission, filed one brief covering all three cases. The cases were argued together before the court of appeals. Faith Center, by this one petition, seeks a writ of certiorari to review the adverse judgments in both the Los Angeles and San Francisco proceedings (Case Nos. 83-2295 and 84-1085). Faith Center is not petitioning for a writ of certiorari in Case No. 84-1086.

OPINIONS BELOW

The *per curiam* order and judgment of the court of appeals in its case No. 84-1085 ("the San Francisco proceeding") is unreported and is set forth in Appendix A, *infra*, pp. 1a-2a. The *per curiam* order and judgment of the court of appeals in its case No. 83-2295 ("the Los Angeles proceeding") is unreported and is set forth in Appendix B, *infra*, pp. 3a-4a. The order of the Federal Communications Commission in the San Francisco proceeding is unreported and appears in Appendix C, *infra*, pp. 5a-6a. The order of the Federal Communications Commission in the Los Angeles proceeding is unreported and appears in Appendix D, *infra*, pp. 7a-14a. The Memorandum Opinion and Order of the Review Board in the San Francisco proceeding is reported at 94 F.C.C. 2d 756 and appears in Appendix E, *infra*, pp. 15a-21a. The Memorandum Opinion and Order of the Review Board in the Los Angeles proceeding is reported at 92 F.C.C. 2d 1255 and appears in Appendix F, *infra*, pp. 22a-32a. The Memorandum Opinion and Order of the Administrative Law Judge in the San Francisco proceeding is unreported and appears in Appendix G, *infra*, pp. 33a-37a. The Memorandum Opinion and Order of the Administrative Law Judge in the Los Angeles proceeding is unreported and appears in Appendix H, *infra*, pp. 38a-51a.

JURISDICTION

The judgments below in both the San Francisco and the Los Angeles proceedings were entered on May 9, 1985. (App. A and B, *infra*, pp. 1a, 3a.) A timely petition for rehearing in the San Francisco proceeding was denied on July 8, 1985. (App. I, *infra*, p. 52a.) A timely petition for rehearing and suggestion for rehearing *en banc* in the Los Angeles proceeding was denied on July 2, 1985. (App. J, *infra*, p. 53a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The religion clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I.

STATEMENT

In this case the Federal Communications Commission ("FCC" or "Commission") dismissed a church's application for renewal of a radio broadcast license and a television broadcast license, the reason given being, in the Commission's words, the Church's "failure to prosecute" the applications. (App. F, *infra*, p. 31a.) The failure to prosecute occurred when the church, Faith Center, Inc., refused to comply with broad and sweeping discovery orders which it believes contravene the First Amendment rights of the church and its adherents.

I. Background

A. Faith Center, Inc.

Petitioner Faith Center, Inc. is a nonprofit church corporation founded in 1947 and located in Glendale, California. With approximately 10,000 members, Faith Center is governed by its congregation.

Under California law, Faith Center's ministers are qualified to perform marriages and conduct funerals. The church operates a bible school, supports foreign missions, and engages in other forms of religious activity. The church has been recognized by the Internal Revenue Service as a nonprofit church organization, and this has never been challenged by the government. In October, 1961, Faith Center also amended its articles of incorporation to allow the operation of radio and television stations "for the primary purpose of disseminating the Gospel of Jesus Christ." (D.C. No. 83-2295, Jt. App. at 792.)

Petitioner owns the broadcasting licenses for one television station, KVOF-TV, Channel 38, San Francisco, California and one radio station, KHOF-FM, Los Angeles, California. Each station broadcasts exclusively for religious purposes. Faith Center also formerly owned the broadcasting licenses for WHCT-TV, Channel 18, Hartford, Connecticut, and KHOF-TV, Channel 30, San Bernardino, California.

B. Prior Proceedings

This controversy began in September, 1977, when investigators for the Broadcast Bureau (now Mass Media Bureau) ("Bureau") of the FCC appeared at Faith Center and demanded, *inter alia*, access to financial records. The Commission maintained that it was investigating allegations that television station KHOF-TV (San Bernardino), not involved in the present case, had been used to solicit funds for certain purposes, and that the funds were then diverted from those purposes.[2] Faith Center responded in part to the FCC's demands but refused to comply fully because, among other reasons, compliance would have required Faith Center to reveal the identities of its donors and the details of their donations. Faith Center resisted the disclosure of such information on First Amendment grounds, explaining that its religious beliefs require such information to be kept secret.[3]

Subsequently, the Commission designated Faith Center's renewal application for KHOF-TV (San Bernardino) for

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[2] The investigation concerned Faith Center's compliance with the "wire fraud" statute, 18 U.S.C. § 1343, which makes it a federal crime to use radio and television broadcasts for the purpose of carrying out any scheme "to defraud" or "for obtaining money . . . by means of false or fraudulent pretenses, representations or promises. . . ." At no point has any government agency sought to prosecute petitioner for violation of this statute, nor has the Internal Revenue Service sought to revoke petitioner's tax exempt status.

[3] This is based directly on the text of *Matthew* 6:1-4, set forth at p. 16, n.13, *infra*.

hearing to determine whether Faith Center had conducted fraudulent over-the-air fundraising and had refused to cooperate with FCC investigators. During the course of the license renewal proceeding, Faith Center continued to press its constitutional claims. The Administrative Law Judge ("ALJ") rejected Faith Center's arguments (and Faith Center's request for permission to file an interlocutory appeal of the ALJ's order compelling further response to the discovery requests), primarily because the ALJ believed the constitutional objections had been interposed prematurely. The ALJ stated "Faith will be able to make its Constitutional arguments on the merits during the hearing. Therefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding. . . ." (D.C. No. 84-1085, Jt. App. at 295-97.) This was the point of crisis for the petitioner. From this point on, petitioner had no alternative but resistance if it was to protect the integrity of its religious beliefs. The Commission's default here was its failure to establis procedures by which the petitioner's religious claims could be heard *before* they had been violated by compelled disclosure.

Faith Center thereafter unsuccessfully sought to obtain judicial review of the ALJ's ruling by interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit, again arguing, *inter alia*, that the requests violated the church's First Amendment rights and would result "in an unwarranted entanglement by the FCC in church activities and affairs." (*Id.* at 292-94.) The Bureau filed a motion to dismiss this appeal claiming that the interlocutory rulings of the ALJ are not final orders appropriate for review by the court of appeals and therefore the court of appeals lacked jurisdiction. That motion was granted and the appeal was dismissed without reaching the merits on July 13, 1979. (*Id.* at 328.)

Faith Center partially responded to the discovery requests soon after the interlocutory appeal was denied. Subsequently, the ALJ ordered Faith Center to file additional responses to the discovery requests, which included requests for information regarding donors. The Bureau then filed a second set of interrogatories and document requests. (*Id.* at 551-69.) Faith Center partially responded to these requests but again objected on various grounds, reasserting its constitutional objections. On March 17, 1980, the ALJ dismissed Faith Center's application for renewal of KHOF-TV, San Bernardino, for failure to respond to Bureau discovery requests. (*Id.* at 889-97.)

The Commission affirmed the ALJ's order, without resolution of the allegations of fraudulent fund raising and without considering the free exercise rights of the donors. The Commission rejected Faith Center's constitutional claims, although the Commission never required the Bureau to meet any burden, or to demonstrate a compelling governmental interest. Instead, the Commission stated that Faith Center had "not demonstrated that specific discovery requests [were] . . . irrelevant to the Commission's legitimate inquiry. . . ." *Faith Center, Inc.*, 82 F.C.C. 2d 1, 21 (1980). The Commission further stated that Faith Center initially asserted its constitutional claims in good faith. The Commission concluded, however, that, after the dismissal of the interlocutory appeal, Faith Center's claims were made in bad faith, even though there had never been a hearing or a decision on the merits of Faith Center's constitutional claims. The District of Columbia Circuit affirmed the decision in a brief *per curiam* order. *Faith Center, Inc. v. F.C.C.*, 679 F.2d 261 (D.C. Cir. 1982). This Court then denied certiorari. 459 U.S. 1203 (1983).

Subsequently, the Commission designated Faith Center's renewal application for WHCT-TV (Hartford), not involved in this case, for hearing based upon the issues left unresolved in the KHOF-TV (San Bernardino) pro-

ceeding. However, the Commission then granted Faith Center's application for the sale of WHCT-TV, so the same issues were again left unresolved.

II. Proceedings Below

While the FCC investigation into KHOF-TV (San Bernardino) was still continuing, the FCC also started investigations, as a result of the same allegations, regarding the broadcast license renewal applications of stations KVOF-TV (San Francisco) and KHOF-FM (Los Angeles), the stations involved in the present case. In many respects, these investigations resembled the San Bernardino proceeding. The FCC sought the disclosure of a wide range of information, including information relating to donor records. The FCC again rejected the claim that Faith Center was entitled to an adjudication of its First Amendment objections prior to the imposition of sanctions. As explained more fully below, Faith Center refused to comply fully with the FCC's discovery requests, and this resulted in the dismissal of both applications.

A. Los Angeles Proceeding

On April 22, 1982, the Commission designated the renewal application of Faith Center for station KHOF-FM (Los Angeles), and the construction permit applications of two other entities competing for the same broadcast channel, for hearing in a consolidated proceeding.[4] With regard to Faith Center, the hearing was, in summary, to examine: (a) the alleged failures of Faith Center to permit Commission access to certain books, records and employees; (b) the alleged failure of Faith Center to submit information requested by the Commission; and

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[4] The two other entities, Inspiration Media of Southern California, Inc. and Coronado Broadcasting of Southern California, Inc., have since merged to become New Inspiration Broadcasting Co., Inc.

(c) whether Faith Center's over-the-air fund raising broadcasts on KHOF-TV (San Bernardino) violated the "wire fraud" statute, 18 U.S.C. § 1343.

During a prehearing conference in the Los Angeles proceeding, held on June 17, 1982, Faith Center attempted to raise its constitutional objections concerning the scope of discovery sought by the Broadcast Bureau. The ALJ refused to hear any oral argument stating "we don't hold hearings on constitutional issues at this agency that I know of," and requested that any objections be submitted in writing but further stated that the arguments are "not going to go anywhere" because of their resolution in the KHOF-TV (San Bernardino) proceeding. (D.C. No. 83-2295, Jt. App. at 33, 30.) Throughout the discovery process Faith Center attempted to set forth the constitutional arguments on which it relied for not fully responding to all discovery requests, but at no level in the administrative process was Faith Center allowed a meaningful opportunity to present its position.

On June 17, 1982, the Bureau submitted interrogatories and production requests to Faith Center. (*Id.* at 86-107.) Compared to the San Bernardino proceedings, the FCC greatly expanded the scope of its examination of Faith Center's religious and broadcast activities.[5]

On June 28, 1982 Faith Center partially responded to the Bureau's production request but objected to producing the requested documents because of vagueness, the

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[5] During the KHOF-FM (Los Angeles) and KVOF-TV (San Francisco) proceedings now at issue, the FCC initially submitted over 50 numbered interrogatories. This was later expanded to nearly 70 questions, which, when broken into subquestions, numbered over 250 questions. (D.C. No. 83-2295, Jt. App. at 86-103; D.C. No. 84-1085, Jt. App. at 5065-88, 6010-18.) The effect of the interrogatories and the demand for documents in both cases was to require the production of all tapes of programs for more than five years. This would be thousands of hours of tapes. The raw cost of the tapes alone would be hundreds of thousands of dollars.

overbroad scope of the requests, violation of First Amendment rights, and because Faith Center did not own or possess some of the requested materials. (*Id.* at 654-74.) On June 30, 1982, Faith Center filed its memorandum entitled "Constitutional Issues" as to why Faith Center objected to the discovery requests. (*Id.* at 675-723.) Faith Center's position was that the very revelation of individually identified donor records and some of the other requested documents would be a fundamental violation of the theology of the church, and that there could be no remedy for this violation after the information had been produced.[6]

On July 14 and 15, 1982, Faith Center again partially responded to the interrogatories and production request, but objected to producing most documents because, *inter alia*, the release would violate the tenets of the church regarding the secrecy of donor names. Faith Center also objected to the interrogatories on constitutional and other grounds, stating that in the First Amendment context the burden should be on the Bureau to justify the validity of its demands. (*Id.* at 738-787, 882-935, especially 888-890.)

On August 3, 1982, the ALJ stated that Faith Center's constitutional arguments had previously been resolved. (*Id.* at 1598-1604.) On September 13, 1982, the ALJ dismissed with prejudice Faith Center's license renewal application for station KHOF-FM (Los Angeles). (App. H, *infra*, pp. 38a-51a.)

Despite the ALJ's ruling, Faith Center again attempted to respond in part to the discovery demands of the FCC. Faith Center still refused to comply with the demands to

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[6] Petitioner initially objected on constitutional grounds to responding to any discovery requests but did relent and provide considerable information to the Bureau. At this point, petitioner is principally challenging, on constitutional grounds, the Bureau's right to donor and other confidential church financial records.

reveal the identity of its donors in connection with amounts given to the church or to reveal the exact amounts donated by the church's pastor, Dr. Eugene Scott.[7] However, pursuant to an agreement, donor records with names and addresses deleted were flown to the FCC in Washington on October 1, 1982. When the records arrived there, the FCC refused to accept them. (D.C. No. 84-1085, Jt. App. at 2947-51.)

On January 18, 1983, the Review Board denied Faith Center's appeal of the ALJ's decision. (App. F, *infra*, pp. 22a-32a.) On November 18, 1983, the Commission denied Faith Center's Application for Review of the Review Board's decision. The Commission stated that the "bulk" of Faith Center's contentions were considered in the San Bernardino (KHOF-TV) proceeding and that there was no reason to question the validity of the Commission's earlier treatment of the issues. (App. D, *infra*, pp. 7a-14a.) The Commission did address Faith Center's claim that the discovery demands would require it to reveal the identities of individual donors. The Commission stated that the Bureau had disclaimed any intention to seek this information and that Faith Center had never offered to produce records with individual names deleted. Both of these conclusions are erroneous: the Bureau never abandoned the position that it was entitled to these records,[8] and Faith Center had offered to produce the

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[7] Dr. Scott is a duly ordained minister who earned his Doctorate in Philosophy of Education from Stanford University in 1957. Dr. Scott is pastor and president of Faith Center, President of Wescott Christian Center Church and President of the Full Gospel Fellowship of Churches and Ministers International, the denomination with which Faith Center is affiliated. The denomination is comprised of approximately 2000 member churches, with over two million adherents worldwide.

[8] In a June 15, 1978 "By Direction" letter regarding station KHOF-TV, San Bernardino, the FCC stated that it "may be able to make a determination" without the donor names "and will not require its production, *at least for the present.*" (Emphasis added.)

records with donor names deleted. (D.C. No. 84-1085, Jt. App. at 2947-51.) In any event, the Commission concluded: "it bears noting that the information requested is highly probative because it represents the best evidence of the amount of money solicited and the existence of a specific designation for the use of the funds. Thus, there is a compelling interest in the disclosure of the material." (App. D, *infra*, p. 10a.) In reaching this conclusion, however, the Commission never addressed such issues as the extent to which disclosure would interfere with petitioner's First Amendment rights and the centrality of this particular belief to petitioner's religion. Faith Center then appealed the Commission's decision to the District of Columbia Circuit, invoking jurisdiction under 47 U.S.C. § 402(b). The court of appeals affirmed the Commission's ruling without opinion. (App. B, *infra*, pp. 3a-4a.)

B. San Francisco Proceeding

On July 6, 1982, the Commission designated Faith Center's renewal application for station KVOF-TV, San Francisco, and the construction permit applications of other entities competing for the same broadcast channel for hearing in a consolidated proceeding.[9] The Commission stated that a final determination as to Faith Center's qualifications would be conditioned on the outcome of the Los Angeles proceeding. Any issues left unresolved in the Los Angeles matter were then to be considered in the

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Faith Center, Inc., 69 F.C.C. 2d 1123, 1127 n.1 (1978). However as early as May, 1979, the Bureau took the position that the Commission's letter did not preclude the Bureau from requesting donor names (as was done in the interrogatories and production requests in the Los Angeles and San Francisco proceedings) since the Commission only stated it did not require production "for the present." (D.C. No. 84-1085, Jt. App. at 296.)

[9] The other entities were West Coast United Broadcasting Co., Together Media Ministries, and LDA Communications, Inc.

San Francisco proceeding. *Faith Center, Inc.*, 90 F.C.C. 2d 520 (1982).

On December 16, 1982, the Bureau filed its First Motion for the Production of Documents by Faith Center and its First Interrogatories. (D.C. No. 84-1085, Jt. App. at 5061-97.) In January 1983, Faith Center was directed to produce the documents requested in the Bureau's motion for production, respond to the Bureau's interrogatories, produce Dr. Scott and others for depositions, and answer interrogatories of competing applicants. (*Id.* at 5180, 5916-19.)

On March 3, 1983, the Bureau filed its Second Interrogatories to Faith Center. These interrogatories, numbered 63 through 69, included over 50 additional subquestions. (*Id.* at 6010-18.) On March 16, 1983, Faith Center partially responded to the second set of interrogatories but objected to further responding or producing documents on, *inter alia*, constitutional grounds. (*Id.* at 6023-36.)

On March 24, 1983, the ALJ dismissed Faith Center's license renewal application for KVOF-TV (San Francisco). (App. G, *infra*, pp. 33a-37a.) On May 23, 1983, Faith Center filed an appeal with the Review Board urging reversal of the dismissal order, objecting, *inter alia*, to the Bureau's discovery requests on constitutional and procedural grounds. (D.C. No. 84-1085, Jt. App. at 6537-56.) On July 7, 1983, the Review Board denied Faith Center's appeal, stating that the constitutional objections had already been rejected by the Board, the Commission and the courts. (App. E, *infra*, pp. 15a-21a.)

Review Board Chairman Marino attached a separate statement to the Review Board's July 7, 1983 order, including the following comment:

> Our action in this case is compelled by the legal authority cited in the Board's order. But this is an occasion to think anew and deeper about such cases.

> Faith Center is now a step closer to losing its third, and possibly fourth, station for what on the record before us are sound procedural reasons. Perhaps this raging controversy which began with the licensee's good faith assertion of its constitutional rights, *Faith Center, Inc.*, 69 FCC 2d 1123, 1124 (1978), might have been contained if a procedural device had been used which permitted the licensee to obtain a final Court adjudication of its constitutional claims without putting all of its licenses in jeopardy. See authorities cited in my separate statement, *David Hildebrand*, 52 RR 2d 1671 (1983). Past experience teaches that renewal hearings are not the best vehicles for the adjudication of potential constitutional issues.

(App. E, *infra*, p. 20a.)

On August 8, 1983, Faith Center applied for Commission review of the Review Board's July 7, 1983 order. (D.C. No. 84-1085, Jt. App. at 6076-86.) Among the most important reasons raised by Faith Center in support of its application for review was the constitutionality of the scope of discovery to which Faith Center was compelled to respond. On February 7, 1984, the Commission denied Faith Center's application for review. (App. C, *infra*, pp. 5a-6a.)

Faith Center then appealed the Commission's decision to the District of Columbia Circuit, invoking jurisdiction under 47 U.S.C. § 402(b). The court of appeals affirmed the Commission's ruling without opinion. (App. A, *infra*, pp. 1a-2a.)

REASONS FOR GRANTING THE WRIT

The FCC has taken the position that the free exercise clause of the First Amendment does not prevent a wide ranging investigation of church records, including the compelled disclosure of donor records, even though such disclosure would violate petitioner's religious beliefs, and

even though petitioner did not have an opportunity to obtain a ruling on its constitutional claim *prior* to the imposition of sanctions. Thus, petitioner has never had a decision from any tribunal on the merits of its constitutional claims under the First Amendment. This position, upheld by the court below, is inconsistent with the decisions of this Court in the First Amendment field, which require the government to accommodate the exercise of religious rights when the government has not first established a compelling interest and the absence of a less restrictive alternative.

There are a large number of religious broadcasters: over 1100 individuals and organizations are members of the National Religious Broadcasters. In recent years, the FCC has exhibited an increased willingness to investigate the fundraising practices of religious broadcasters.[10] It is, therefore, important for this Court to define the extent to which the FCC must recognize the First Amendment rights of its licensees, and make appropriate accommodations.

I. The Sweeping Scope of the FCC's Position is an Undue Burden on the Petitioner's Free Exercise Rights Under the First Amendment

This Court has long held that the free exercise clause of the First Amendment prohibits governmental regulation of religious beliefs. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972). This Court has also recognized that the free exercise clause affords substantial protection for conduct based on religious beliefs. *Id.* at 220; *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963).

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[10] Hardy & Secrest, *Religious Freedom and the Federal Communications Commission*, 16 Val. U. L. Rev. 57, 83 (1981); *see generally* Albert, *Federal Investigation of Video Evangelism: The FCC Probes the PTL Club*, 33 Okla. L. Rev. 782 (1980).

When a governmental regulation burdens the free exercise of religion, "[t]he state may justify [such] an inroad . . . by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718. In *Yoder*, Chief Justice Burger reviewed this Court's free exercise opinions in these words: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. "Where fundamental claims of religious freedom are at stake, . . . we must *searchingly examine* the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption." *Id.* at 221 (emphasis added). The Court long ago rejected the view that a "showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The FCC's position below was that "it is doubtful that a religious organization has any right to be treated differently from other licensees when it comes to the FCC's authority to obtain relevant information." [11] Moreover, the FCC never "searchingly examined" petitioner's constitutional claim. For example, nowhere in its ruling on the constitutional issues did the Commission engage in the sensitive balancing required by the decisions of this Court.[12] The Commission's position—that the First Amendment does not require an accommodation to peti-

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[11] Brief for the FCC at 34, n.45 (D.C. Nos. 83-2295, 84-1085, 84-1086).

[12] *See generally* Nowak, Rotunda and Young, *Constitutional Law*, Ch. 19 § III at 1054 (1983) (summarizing this Court's free exercise analysis).

tioner's free exercise rights—is inconsistent with decisions of this Court requiring an accommodation when the government cannot demonstrate that the burden on religious liberty that would otherwise result "is essential to accomplish an overriding governmental interest." *United States v. Lee* 455 U.S. 252, 257-58 (1982).

The FCC has never challenged the sincerity of Faith Center's contention that maintaining the privacy of donations and donors is a central tenet of the theology of the church and of the religious beliefs of its members. Maintaining the privacy of these matters is not merely a personal secular opinion; rather, this belief is "one of deep religious conviction," *see Yoder*, 406 U.S. at 216, and is, in fact, "fundamental" to the faith espoused by petitioner. *Id.* This belief is not without foundation, nor is it peculiar or idiosyncratic. It is based primarily upon *Matthew* 6:1-4.[13] Petitioner's belief in this doctrine is so deeply held that it has sturdily resisted encroachment on it despite its awareness that the FCC was unlikely to grant petitioner a hearing. This has now continued to the point where the petitioner is on the brink of losing its

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[13] "Take heed that ye do not your alms before men, to be seen of them: otherwise ye have no reward of your Father which is in heaven. Therefore, when thou doest thine alms, do not sound a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, They have their reward. But when thou doest alms, let not thy left hand know what they right hand doeth: *That thine alms may be in secret:* and thy Father which seeth in secret himself shall reward thee openly." [Emphasis added.]

This Christian doctrine has roots in the ancient Jewish law. A leading compilation, known as the "Mishna Torah," was made by Moses Maimonides, who flourished in the Twelfth Century. His work was later summarized by Rabbi Caro in the Fifteenth Century, in the *Shulkon Arut* ("Code of Jewish Law"). The relevant passage, in paragraph 13 of Chapter 34 of this work, reads as follows: "It is urgent to make charitable contributions secretly, and if possible in such a way that the giver is not aware to whom he is giving it, and the recipient does not know from whom he is receiving it."

third and fourth broadcasting licenses. The petitioner's position has consistently been that any disclosure of the identity of donors directly violates a central tenet of the well established, traditional religious beliefs of the members of the petitioner. Moreover, the apparent reasonableness of this religious belief is not open to question. *United States v. Ballard*, 322 U.S. 78 (1944).

The FCC has a legitimate interest in preventing the fraudulent use of the airwaves. Petitioner does not suggest that the FCC has no authority to seek information relevant to allegations of fraudulent conduct.[14] Petitioner contends, however, that the decisions of this Court require that a licensee be given an opportunity to obtain a ruling on its claim that compelled disclosure would violate a sincere religious belief *prior to the imposition of sanctions.*[15]

This Court has often noted that the compelled disclosure of membership lists and donor records can raise serious First Amendment concerns. *See, e.g., Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into

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[14] There are, of course, establishment clause limits to the FCC's investigatory powers. *See Surinach v. Pesquera de Busquets*, 604 F.2d 73, 76-77 (1st Cir. 1979), in which the court held the compelled disclosure of financial records was unconstitutional because the government had (a) failed to establish "a compelling State interest" in its investigation of church school finances, and (b) the investigation constituted "a palpable threat of state interference with the internal policies and beliefs of these church related schools."

[15] In *Scott v. Rosenberg*, 702 F.2d 1263, 1273 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 1439 (1984), the court, after discussing the applicable precedents, stated that when a conflict between an FCC investigation and free exercise rights occurs, "[a] compelling governmental interest must be shown at that point. . . ."

or demand all forms of information." 372 U.S. at 545. This Court has stated that "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights . . . that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Id.* at 546. More recently, in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), this Court held that the disclosure provisions of the Ohio campaign reporting law could not constitutionally be applied to the Socialist Workers Party, "a minor political party which historically has been the object of harassment by government officials and private parties." 459 U.S. at 88.

The FCC asserts that no accommodation is warranted because "this is not a case in which a broadcaster otherwise cooperated with the Commission and invoked the First Amendment solely for the limited purpose of withholding donor records from the FCC." [16] It is clear, how-

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[16] Brief for the FCC at 35 (D.C. Nos. 83-2295, 84-1085, 84-1086). The Commission, for example, emphasizes that Faith Center did not answer numerous interrogatories and did not produce videotapes that Faith Center maintained were owned by, and in the possession of, Wescott Christian Center Church ("Wescott"). The Commission's position on this issue, however, further supports petitioner's claim that a hearing on the constitutional issues should have been afforded prior to the imposition of sanctions. The FCC rejected petitioner's claims that Faith Center and Wescott were separate churches, and that Dr. Scott as president of each had separate fiduciary and ecclesiastical duties to each, stating these claims were made in bad faith. The FCC's determination on this issue, without benefit of a hearing, raises the precise problems identified in *Jones v. Wolf*, 443 U.S. 595 (1979), and *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), in which this Court discussed the First Amendment prohibitions against civil courts making determinations about church hierarchy and doctrine. The risk of unconstitutional administrative forays into such sensitive issues could well have been avoided if the petitioner had been afforded a hearing at which "neutral principles of law" (*Jones v. Wolf*, 443 U.S. at 600, 602) had been applied

ever, that the FCC regarded petitioner's First Amendment claim as a challenge to its regulatory powers, and that the FCC did not conduct a narrowly focused search for relevant information. Indeed, the Commission *never* considered the petitioner's claim on its merits after its functionary, the ALJ, had denied such consideration, and had further denied an interlocutory appeal under 47 C.F.R. § 1.301 in the San Bernardino proceeding. Even though Faith Center offered to provide individual donor records with the names and addresses of individual donors stricken, the FCC never abandoned the position that it was entitled to full donor information despite petitioner's First Amendment objections. (Brief for the FCC at 34, n.45 (D.C. Nos. 83-2295, 84-1085, 84-1086).)

II. The Judgment Below is Contrary to this Court's Decisions that Overbroad Statutes or Administrative Actions in the First Amendment Area are Constitutionally Invalid

The FCC's broad demands and its refusal to afford petitioner a hearing on its constitutional claims prior to the imposition of sanctions, upheld by the court below, are also inconsistent with this Court's decisions in the parallel free speech area of the First Amendment. This Court has often recognized that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). In order to implement this standard, this Court has developed rules designed to prevent procedural decisions from infringing on First Amendment rights. *See* Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970). For this purpose a number of doctrines have been long-established, such as "least restrictive alternative" and "overbreadth," *see* L. Tribe, *American Constitutional*

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to determine the separateness of the two churches. *See also Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The Commission could have avoided these sensitive issues simply by seeking information from Wescott.

Law §§ 12-24, 30, 36 (1978), under which this Court has invalidated administrative actions that failed to assure adequate judicial review of First Amendment claims. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). As in *Bantam Books*, 372 U.S. at 70, the practice of the FCC here "provides no safeguards whatever" against violation of the petitioner's deeply held religious tenets.

Thus, the FCC's position fails to adhere to the standards established by this Court. Although it may have a legitimate interest in some of the information covered by its discovery demands, the Commission's inquiry, in the religion context, was clearly overbroad, and went substantially beyond permissible limits. The Commission's failure to afford a procedural device by which petitioner could receive a prompt adjudication of its First Amendment objections is inconsistent with the approach required by this Court's decisions in the free speech area. In *Speiser v. Randall*, this Court held that an article of the California Constitution was invalid under the parallel free speech clause of the First Amendment. In reaching this result, it said: "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure." 357 U.S. at 529. Surely, a claim based on "free exercise of religion" is not entitled to less protection than one based on "freedom of speech." *Cf. First Unitarian Church v. Los Angeles*, 357 U.S. 545, 547 (1958). Both clauses stand together at the apex of our constitutional system.

The Commission's position that the petitioner has, in effect, "waived" its right to assert potentially legitimate First Amendment claims because petitioner's objections went beyond the category of donor records ignores this Court's overbreadth decisions, which permit facial challenges to allegedly overbroad statutes or regulations cov-

ering both protected and unprotected activities. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Aptheker v. Secretary of State*, 378 U.S. 500, 515-17 (1964). "The only solution, then, is to strike down such an overbroad law altogether until it is rewritten or until an appropriate court authoritatively narrows it." L. Tribe, *supra*, § 12-24 at 711.

In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), this Court used language, in the context of free speech, which is applicable here. It said that the deterrent to protected speech is not effectively removed if "the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution [or other sanctions] to determine the proper scope of regulation." 380 U.S. at 487 (bracketed material added).

The hardiness of the petitioner here has been extreme. The Court should make it plain that freedom of religious belief is protected no less than freedom of speech. The overbreadth doctrine can be applied here by putting the burden on the FCC to show that its demands do not unduly impair the petitioner's broad constitutional right to the free exercise of its religion as it sees it.

III. Other Cases Pending

This case is similar to two other cases pending before this Court. In the Petition for a Writ of Certiorari at 5, in *Goldman v. Weinberger*, 734 F.2d 1531 (D.C. Cir. 1984), *cert. granted*, 105 S.Ct. 3475 (1985) (No. 84-1097), this Court has been asked to decide whether "the military services may impose direct prohibitions on religious observances if their only justification is 'enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement.'" In *Roy v. Cohen*, 590 F. Supp. 600 (M.D. Pa. (1984), *prob. juris. noted sub nom., Heckler v. Roy*, 105 S.Ct.

3474 (1985) (No. 84-780), this Court will decide whether the requirement that applicants for welfare benefits submit a social security number violates the free exercise rights of individuals who have a religious objection to furnishing such information.

The broader question presented in *Goldman* and *Roy*—whether the First Amendment requires an exemption from a facially neutral governmental requirement—is a recurring one. This Court has encountered the issue in a variety of contexts in recent years. *Jensen v. Quaring*, 105 S.Ct. 3492 (1985) (*per curiam*), *aff'g, by an equally divided Court, Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984); *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Board*, 450 U.S. 707 (1981). This Court's efforts to reach an appropriate accommodation have been the subject of thoughtful commentary. *See* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983); Garvey, *Freedom and Equality in the Religious Clauses*, 1981 Sup. Ct. Rev. 193; Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N.Ky.L. Rev. 265, 303 (1982).

Goldman and *Roy* may solve some of the problems. It is unlikely, however, that this Court's decisions in those cases will answer the question presented by this petition. Whether the FCC will continue to have unlimited authority during the discovery stage of its investigations, with no obligation to make accommodations to religious beliefs, will still be unclear. Neither *Goldman* nor *Roy* requires this Court to address whether a governmental agency may compel disclosure of information in violation of a sincerely held religious belief without first affording an opportunity for the adjudication of the First Amendment right involved. This Court should grant review to decide this issue in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgments of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September, 1985

APPENDICES

APPENDIX A

Judgment of the Court of Appeals in the San Francisco Proceeding

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 84-1085

FAITH CENTER, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

WEST COAST UNITED BROADCASTING COMPANY,
Intervenor

Appeal from an Order of the Federal Communications Commission

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No. 84-1086

LUCILLE JOHNSTON,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

WEST COAST UNITED BROADCASTING COMPANY,
Intervenor

Petition for Review of an Order of the Federal Communications Commission

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[Filed May 9, 1985]

Before: EDWARDS and STARR, Circuit Judges, and GESELL,* District Judge

JUDGMENT

These causes came on to be heard on an appeal from an order and a petition for review of an order of the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Federal Communications Commission on appeal and under review herein are hereby affirmed. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX B

Judgment of the Court of Appeals in the Los Angeles Proceeding

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 83-2295

FAITH CENTER, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NEW INSPIRATION BROADCASTING CO., INC.,
WESCOTT CHRISTIAN CENTER,
DR. W. EUGENE SCOTT,
LUCILLE E. JOHNSTON,
Intervenors

Appeal from an Order of the
Federal Communications Commission

[Filed May 9, 1985]

Before: EDWARDS and STARR, Circuit Judges, and GESELL,* District Judge.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

JUDGMENT

This cause came on to be heard on an appeal from an order of the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the order of the Federal Communications Commission under review herein is hereby affirmed. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Dated: May 9, 1985.

APPENDIX C

Order of the Federal Communications Commission in the San Francisco Proceeding

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FCC 84-41

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BC Docket No. 82-339
File Nos. BRCT-711 and BRCT-801015KE

IN RE APPLICATIONS OF FAITH CENTER, INC.

For renewal of license for
Station KVOF-TV
San Francisco, California

BC Docket No. 82-340
File No. BPCT-810113KI

WEST COAST UNITED BROADCASTING COMPANY
San Francisco, California

BC Docket No. 82-341
File No. BPCT-810115KE

TOGETHER MEDIA MINISTRIES
San Francisco, California

BC Docket No. 82-342
File No. BPCT-810115KF

LDA COMMUNICATIONS, INC.
San Francisco, California

For Construction Permit

ORDER

Adopted: February 3, 1984; Released: February 7, 1984

By the Commission:

1. The Commission has before it: (1) an Application for Review filed August 8, 1983 by Faith Center, Inc. (Faith) and Oppositions thereto filed August 17 by West Coast United Broadcasting Co. (WCUB) and August 23 by Together Media Ministries (TMM), LDA Communications, Inc. (LDA), and the Mass Media Bureau, and (2) an Application for Review filed August 8 by Lucille Johnston and Oppositions thereto filed August 17 by WCUB and August 23 by TMM, LDA, and the Mass Media Bureau. These pleadings relate to a Memorandum Opinion and Order by the Review Board affirming the dismissal of Faith's application for renewal of its license to operate station KVOF-TV, San Francisco, California.[1]

2. IT IS ORDERED, That pursuant to Section 1.115 (g) of the Commission's Rules, the Applications for Review filed August 8, 1983 by Faith Center, Inc. and Lucille Johnston ARE DENIED.

3. IT IS FURTHER ORDERED, That Faith Center, Inc. IS AUTHORIZED to continue operation of Station KVOF-TV until 12:01 a.m., ninety (90) days after the release of this Order to enable the licensee to conclude the station's affairs, PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our Order, IT IS AUTHORIZED to continue to operate the station until ninety (90) days after reconsideration or judicial review is completed. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate.

FEDERAL COMMUNICATIONS COMMISSION
William J. Tricarico
Secretary

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[1] FCC 83R-47, released July 7, 1983.

APPENDIX D

Order of the Federal Communications Commission in the Los Angeles Proceeding

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FCC 83-530

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BC Docket No. 82-212
File No. BRH-826

IN RE APPLICATIONS OF FAITH CENTER, INC.

For Renewal of License of
Station KHOF (FM)
Los Angeles, California

BC Docket No. 82-213
File No. BPH-10774

INSPIRATION MEDIA OF SOUTHERN
CALIFORNIA, INC.
Los Angeles, California

BC Docket No. 82-214
File No. BPH-801103AM

CORONADO BROADCASTING OF
SOUTHERN CALIFORNIA, INC.[1]
Los Angeles, California

For Construction Permits

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[1] Inspiration Media of Southern California, Inc. and Coronado Broadcasting of Southern California, Inc. have merged to form New Inspiration Broadcasting Co., Inc.

ORDER

Adopted: November 8, 1983; Released: November 18, 1983

By the Commission: *Commissioner Rivera absent.*

1. Before the Commission are (1) an Application for Review filed June 9, 1983 by Faith Center, Inc. (Faith) and Oppositions filed June 17 by New Inspiration Broadcasting Co., Inc. and June 24 by the Mass Media Bureau; and (2) Faith's Second Motion for Extension of Time filed May 23. Faith, a nondenominational Christian church, seeks review of a Decision of the Review Board dismissing its application for renewal of its license to operate station KHOF-FM, Los Angeles, California.[2]

2. We are fully in accord with the Review Board's Decision in this case. Faith announced at the outset of this proceeding that it would not participate in discovery procedures because of constitutional objections, which were previously rejected by the Commission and the courts.[3] Faith's discovery responses in this proceeding amply corroborate its unwillingness to participate in any meaningful way in the determination as to its qualifications to be a licensee.[4]

3. We will therefore deny review. However, we wish to make clear that we have carefully reexamined Faith's constitutional arguments. The bulk of its contentions

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[2] FCC 83R-3, released January 17, 1983, 52 RR 2d 1547 (Rev. Bd. 1983).

[3] *Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81-235, released May 12, 1981, *aff'd per curiam*, 679 F.2d 261 (D.C. Cir. 1982), *reh. denied*, June 22, 1982, *cert. denied*, 103 S. Ct. 1188 (1983).

[4] Faith raises three collateral arguments. Faith's argument concerning a motion to disqualify the presiding administrative law judge is without merit. Further, we cannot discern how any prejudice to Faith could have resulted from allegedly improper "secret depositions" taken by the Bureau. Finally, Faith's argument concerning its supplemental renewal application is moot.

clearly reiterate arguments advanced and fully considered in a prior proceeding involving Faith's co-owned San Bernardino, California television station.[5] That proceeding, like the present one, was concerned with questions of whether Faith engaged in fraudulent over-the-air fundraising and failed to cooperate with a Commission investigation. Among these repetitious arguments are Faith's main arguments that application of the federal wire fraud statute to Faith would result in an unconstitutional questioning by the government of Faith's religious beliefs and unconstitutional entanglement in Faith's affairs.[6] Also considered previously are: (1) the justification for inquiring into the affairs of a related church, Wescott Christian Center,[7] (2) the adequacy of the notice given Faith, especially by the bill of particulars,[8] and (3) the justification for requiring the disclosure of the donation records of Faith's pastor, Dr. Scott.[9] We see no reason

[5] Note 3, *supra*.

[6] 82 FCC 2d at 17-21. *See also Scott* v. *Rosenberg*, 702 F.2d 1263, 1272-76 (9th Cir. 1983), *reh. denied*, April 22, 1983. Faith's additional argument that the federal wire fraud statute does not apply to intrastate broadcasts is without merit. *See* 1952 U.S. CODE CONG. AD. NEWS 2264-65; 1956 U.S. CODE CONG. & AD. NEWS 3090-91. *Cf. Gagliardo* v. *United States*, 366 F.2d 720 (9th Cir. 1966).

[7] 82 FCC 2d at 27-28, 30 n.88. In view of the close relationship between Faith and Wescott, the Commission characterized Faith's attempts to justify the nondisclosure of information and documents on grounds that they were possessed by Wescott rather than Faith as a "bad faith contrivance". This led to the designation of an issue in this proceeding as to whether Wescott was used as an alter ego to frustrate the Commission.

[8] 82 FCC 2d at 8-12. The bill of particulars previously served in the San Bernardino proceeding covers those issues redesignated in this proceeding. Issues newly designated in this proceeding concern matters discussed in the San Bernardino proceeding. Thus, no additional bill of particulars is required.

[9] 82 FCC 2d at 10, 21 n.63. Dr. Scott's records are relevant because he allegedly misrepresented during fundraising appeals that he contributed his own funds. *See also Scott* v. *Rosenberg*, 702 F.2d at 1275.

to question the validity of our earlier treatment of these matters, which was affirmed by the courts.

4. Two points, although considered in the earlier proceeding, merit brief discussion. Faith argues that some of the Mass Media Bureau's interrogatories and document requests would result in the disclosure of the identities of individual donors to Faith. The Bureau has disclaimed any intention of requiring the disclosures of individual donors' names.[10] Moreover, Faith has never indicated a willingness to provide the requested information with individual donor names deleted.[11] Nevertheless, it bears noting that the information requested is highly probative because it represents the best evidence of the amount of money solicited and the existence of a specific designation for the use of the funds. Thus, there is a compelling interest in the disclosure of the material.[12] Finally, we wish to emphasize that the Bureau's discovery requests potentially involving the disclosure of donor names constitute only a portion of those which were not responded to adequately by Faith, and which resulted in the dismissal of its applications. Faith also argues that two former Faith employees whose allegations gave rise to the fraudulent fundraising issue have since retracted

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[10] Broadcast Bureau's Motion to Compel filed August 9, 1982 at 7 n.1. Faith specifically refers to interrogatories 3(c) (identify all financial records consulted by bookkeepers and accountants at Faith) and 3(e) (identify financial records and books in which bookkeepers and accountants at Faith made entries), and documents requests 1 (documents identified in response to interrogatories), 2 (documents reflecting monies received and/or expended from solicitation of funds), and 3 (documents pertaining to initiation, completion, and payment for projects for which funds solicited).

[11] *Accord, United States* v. *Morton Salt Co.*, 338 U.S. 632, 653 (1950).

[12] *See Scott* v. *Rosenberg, supra. See also NAACP* v. *Alabama*, 357 U.S. 449 (1958); *United States* v. *Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980). *But see United States* v. *Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

their charges. As we stated in the San Bernardino proceeding, Faith's contentions, which rest mainly on depositions given by these individuals, raise factual questions that are more appropriate for consideration at the evidentiary hearing. Faith has not provided a sufficient basis for circumventing normal hearing procedures.[13]

5. Other arguments by Faith not explicitly discussed in the San Bernardino proceeding are merely variations of those that were considered and, thus, do not require us to reach a different result. Faith urges that it has been required to make "unconscionable statements" against its religious beliefs in violation of its constitutional rights by being forced—*e.g.*, in answering interrogatories—to adopt the Bureau's secular terminology for its fundraising activities. But since Faith has no constitutional grounds to avoid participating in this proceeding, this argument does not justify noncompliance with discovery.[14] Faith also submits that the Bureau's discovery requests are an unconstitutional seizure in violation of Faith's Fourth Amendment rights. This argument presumes, however, that the Bureau's discovery is indefinite and overbroad, a contention with which we disagree. Faith further argues that one of the issues newly designated in this case, concerning allegedly harassing law suits brought against potential witnesses and Commission personnel, violates Faith's freedom of petition. It is well established, however, that the First Amendment does not protect abuse of judicial process.[15]

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[13] 82 FCC 2d at 8-9. Although one of the individuals involved has since given further deposition testimony, it is in the same vein as the original testimony. *See also Scott* v. *Rosenberg*, 702 F.2d at 1275; 82 FCC 2d at 10.

[14] *Compare Wooley* v. *Maynard*, 430 U.S. 705 (1977) *with Palmer* v. *Board of Education of the City of Chicago*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

[15] *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1946).

6. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review filed June 9, 1983 by Faith Center, Inc. IS DENIED.

7. IT IS FURTHER ORDERED, That Faith's Second Motion for Extension of Time filed May 23, 1983 IS DISMISSED as moot.[16]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

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[16] The relief sought was granted by FCC 83I-60, released May 25, 1983. Faith filed this second Motion after it appeared that its original Motion had been lost in transit.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BC Docket No. 82-212
File No. BRH-826

IN RE APPLICATIONS OF FAITH CENTER, INC.

For Renewal of License of Station KHOF (FM)
Los Angeles, California

BC Docket No. 82-213
File No. BPH-10774

INSPIRATION MEDIA OF SOUTHERN CALIFORNIA, INC.
Los Angeles, California

BC Docket No. 82-214
File No. BPH-801103AM

CORONADO BROADCASTING OF SOUTHERN CALIFORNIA, INC.

For Construction Permits

ERRATUM

Released: November 29, 1983

The Commission's Order in the above-captioned proceeding, FCC 83-530, released November 18, 1983, inadvertently omitted a standard ordering clause applicable where a renewal application has been denied. The Order is corrected to add the following language as new paragraph 8:

> 8. IT IS FURTHER ORDERED, That Faith Center, Inc. IS AUTHORIZED to continue operation of station KHOF-FM until 12:01 a.m., February 17,

1984, to enable the licensee to conclude the station's affairs, PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our Order, it IS AUTHORIZED to continue to operate the station until ninety (90) days after reconsideration or judicial review is completed. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX E

Memorandum Opinion and Order of the Review Board in the San Francisco Proceeding

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FCC 83R-47

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BC Docket No. 82-339
File Nos. BRCT-711 and BRCT-801015KE

IN RE APPLICATIONS OF FAITH CENTER, INC.

For Renewal of License for Station
KVOF-TV San Francisco, California

BC Docket No. 82-340
File No. BPCT-810113KI

WEST COAST UNITED BROADCASTING CO.
San Francisco, California

BC Docket No. 82-341
File No. BPCT-810115KE

TOGETHER MEDIA MINISTRIES
San Francisco, California

BC Docket No. 82-342
File No. BPCT-810115KF

LDA COMMUNICATIONS, INC.
San Francisco, California

For Construction Permit

MEMORANDUM OPINION AND ORDER
(Adopted: June 29, 1983; Released: July 7, 1983)

BY THE REVIEW BOARD: BOARD CHAIRMAN MARINO ISSUING SEPARATE STATEMENT.

1. By *Memorandum Opinion and Order* (hereinafter "*Dismissal Order*"), FCC 83M-970, released March 24, 1983, presiding Administrative Law Judge (ALJ) Edward J. Kuhlmann dismissed the application of Faith Center, Inc. for renewal of license of television Station KVOF-TV, San Francisco, California. And, by *Memorandum Opinion and Order* (hereinafter "*Intervention Order*"), FCC 83M-1384, released April 27, 1983, the ALJ dismissed a petition to intervene filed by Lucille E. Johnston. Now before the Review Board for consideration are: (a) an appeal from *Dismissal Order* filed May 23, 1983 by Faith Center; (b) an appeal from *Intervention Order* filed May 27, 1983 by Lucille E. Johnston; (c) opposition to (a) filed June 10, 1983 and an erratum thereto filed June 13, 1983 by Together Media Ministries; (d) opposition to (a) filed June 10, 1983 by LDA Communications, Inc.; (e) opposition to (a) filed June 10, 1983 by West Coast United Broadcasting Co.; (f) opposition to (a) filed June 10, 1983 by the Mass Media Bureau; (g) opposition to (b) filed June 9, 1983 by West Coast United Broadcasting Co.; (h) opposition to (b) filed June 9, 1983 by the Mass Media Bureau; (i) opposition to (b) filed June 10, 1983 by LDA Communications, Inc.; and (j) motion to strike (c) filed June 27, 1983 by Faith Center. For reasons that follow, the Board will deny both of the appeals.

2. *Faith Center's Appeal.* Faith Center's application was dismissed by the ALJ because of its refusal to comply with numerous discovery orders. It has, *inter alia*: (1) never answered interrogatories filed on December 14, 1982 by Together Media Ministries, a competing applicant; (2) failed to produce documents as required by

Order, FCC 83M-87, released January 7, 1983; (3) not complied with *Memorandum Opinion and Order*, FCC 83M-390, released January 31, 1983, which directed it to answer interrogatories propounded by the Mass Media Bureau and LDA Communications; and (4) failed to produce its principals for scheduled depositions as required by *Memorandum Opinion and Order*, FCC 83M-390, *supra*.

3. Faith Center appeals the dismissal of its application and appears to argue that: (1) discovery orders issued by the ALJ during the pendency of its September 7, 1982 motion to disqualify the ALJ (subsequently denied by the Commission, *Faith Center, Inc.*, 90 FCC 2d 519, 52 RR 2d 1223 (1982) were void *ab initio* and, consequently, Faith Center was not required to comply with them; (2) because the ALJ did not certify to the Commission its second motion to disqualify the ALJ, filed December 14, 1982, and its exception to the ALJ's dismissal of that motion, all of the ALJ's subsequent actions were void *ab initio*; (3) illness of its counsel during December 15-21, 1982 accounts, in part, for some of the procedural delays in this case; (4) it was not required to answer the December 14, 1982 motion for production of documents and interrogatories propounded by Together Media Ministries because Faith Center's counsel was not directly served with a copy of them on the date they were filed and that, instead, a copy of the interrogatories was sent to Faith Center's co-counsel in another proceeding; and (5) it objected to the Bureau's discovery requests on constitutional and technical procedural grounds.

4. We reject these complaints. With regard to Faith Center's first argument, after the Commission denied its disqualification request on December 10, 1982, the ALJ extended additional time to Faith Center to comply with discovery. *Dismissal Order*, *supra*, at para. 4. Nevertheless, Faith Center has continued to refuse to comply with the ALJ's discovery orders. As to its second argu-

ment, we find that the ALJ properly rejected its second attempt to disqualify him because it was frivolously and speciously repetitious of the earlier attempt at disqualification which was denied by the Commission. *See Faith Center, Inc., supra.* Thus, continued refusal to comply with discovery on these grounds is equally impermissible. Its third argument is simply not germane; as pointed out above, Faith Center had been given additional time to comply with discovery but failed to do so, and has not even now indicated a willingness to so comply. *Dismissal Order, supra,* at para. 4. Fourth, Faith Center's defective service-of-process argument is rejected as frivolous. It has conceded that "it appears . . . counsel received [the interrogatories] from another attorney, co-counsel in another proceeding, though not this one," Faith Center Appeal, at 6, and that both the interrogatories and the motion for production of documents were "reserved" in mid-January. *Id.*, at 7. Finally, with regard to Faith Center's refusal to fully comply with the Bureau's discovery requests, its resistance to valid discovery requests on constitutional and non-constitutional grounds have already been rejected by the Board, the Commission and the courts. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *aff'd without opinion*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1188 (1982); *Faith Center, Inc.*, 92 FCC 2d 1255, 52 RR 2d 1547 (Rev. Bd. 1983). *Cf. Scott* v. *Rosenberg*, 702 F.2d 1263 (9th Cir. 1983).*

5. *Lucille Johnston's Appeal.* The petition to intervene filed on April 20, 1983 by Lucille E. Johnston was dismissed by the ALJ because it was late filed, no explanation for the tardiness in filing was provided, and because Ms. Johnston had failed to support her claims with spe-

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* Faith Center's June 27, 1983 motion to strike the opposition pleading of Together Media Ministries will be denied because the latter pleading was timely filed on June 10, 1983, and because Faith Center has not specifically alleged sufficient facts to support its motion.

cific allegations of fact. *Intervention Order, supra.* Ms. Johnston appeals her dismissal and asserts, in essence, that as an innocent creditor of Faith Center, she has standing to intervene. We shall deny her appeal for the reasons stated by the ALJ and because she has not stated any new grounds not considered by the ALJ that would warrant intervention. Specifically, she has failed to meet the requirements for late intervention set forth in Section 1.223 of the Rules, 47 CFR § 1.223. In particular, she has not explained why she did not seek intervention within 30 days after publication of the hearing designation order and has not shown that her participation would assist in determining the issues in question in this proceeding. *See Golden State Broadcasting Corp.*, 52 RR 2d 1253 (Rev. Bd. 1982); *Washington's Christian Television Outreach, Inc.*, —— FCC 2d ——, FCC 83R-23, released March 28, 1983. And, her status as a creditor, standing alone, is insufficient to confer standing as a party in interest. *Arizona Mobile Telephone Co.*, 80 FCC 2d 87 (Rev. Bd. 1980); *Hertz Broadcasting of Birmingham, Inc.*, 46 FCC 2d 350, 352 (Rev. Bd. 1974); *cf. American Telephone and Telegraph Co.*, 7 RR 2d 520 (1966) (shareholder status insufficient to confer standing to intervene).

6. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed June 27, 1983 by Faith Center, Inc., IS DENIED; and

7. IT IS FURTHER ORDERED, That the appeal filed May 23, 1983 by Faith Center, Inc. IS DENIED; and

8. IT IS FURTHER ORDERED, That the appeal filed May 27, 1983 by Lucille E. Johnston IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO

Our action in this case is compelled by the legal authority cited in the Board's order. But this is an occasion to think anew and deeper about such cases. Faith Center is now a step closer to losing its third, and possibly fourth, station for what on the record before us are sound procedural reasons. Perhaps this raging controversy which began with the licensee's good faith assertion of its constitutional rights, *Faith Center, Inc.*, 69 FCC 2d 1123, 1124 (1978), might have been contained if a procedural device had been used which permitted the licensee to obtain a final Court adjudication of its constitutional claims without putting all of its licenses in jeopardy. See authorities cited in my separate statement, *David Hildebrand*, 52 RR 2d 1671 (1983). Past experience teaches that renewal hearings are not the best vehicles for the adjudication of potential constitutional issues. *See, e.g.*, Lamb, *No Lamb for Slaughter* (1963); *Brandywine-Main Line* v. *FCC*, 473 F.2d 16, 27-28 n. 39 (D.C. Cir. 1972); and *Kaye Broadcasters*, 46 FCC 2d 600 (1974). On the other hand, Faith Center decided to litigate and is legally responsible for its bizarre, counterproductive and flawed litigation strategy in this and the companion Los Angeles case. *See Faith Center, Inc.*, 92 FCC 2d 1255, 52 RR 2d 1547 (Rev. Bd. 1983).

Recently, after a preliminary inquiry, the Commission referred a case containing similar 18 U.S.C. 1343 allegations to the Department of Justice for appropriate action. A criminal investigation, followed by possible Grand Jury action and trial in a U.S. District Court, would seem a more appropriate process than a less formal administrative hearing, especially when a licensee pleads its freedom of speech and religion, or Fourth and Fifth Amendment rights. The Commission's recent approach of

deferring to other authorities makes much common sense whether the licensee is a controversial preacher accused of soliciting in violation of 18 U.S.C. 1343, an amateur operator alleged to have uttered non-obscene but indecent language, 18 U.S.C. 1464, or a commercial broadcaster who has allegedly conspired to fix prices in violation of the Sherman Act, 15 U.S.C. 1. Similarly, the NLRB is in a better position to resolve unfair labor practice charges against broadcasters. *Community Television of Southern California* v. *Gottfried*, 103 S.Ct. 885, 892-93, and notes 16-17 (1983). But see *Country Broadcasting Co.*, 93 FCC 2d 83, 53 RR 2d 293, 294-5 n.3 (Rev. Bd. 1983), Deferring to other authorities is even more appropriate today because the Commission's limited hearing resources are strained to the limits by matters which are closer to the core of the agency's primary mission set forth in 47 U.S.C. 151.

APPENDIX F

Memorandum Opinion and Order of the Review Board in the Los Angeles Proceeding

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FCC 83R-3

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BC Docket No. 82-212
File No. BRH-826

In re Applications of FAITH CENTER, INC.
FOR RENEWAL OF LICENSE FOR STATION KHOF (FM)
LOS ANGELES, CALIFORNIA

BC Docket No. 82-213
File No. BPH-10774

INSPIRATION MEDIA OF SOUTHERN CALIFORNIA, INC.
Los Angeles, California

BC Docket No. 82-214
File No. BPH-801103AM

CORONADO BROADCASTING OF SOUTHERN CALIFORNIA, INC.
Los Angeles, California

For Construction Permits

MEMORANDUM OPINION AND ORDER

(Adopted: January 10, 1983; Released: January 18, 1983.)

BY THE REVIEW BOARD:

1. Faith Center on November 4, 1982, filed an appeal from an order by Administrative Law Judge Kuhlmann granting a motion to dismiss the renewal application of its FM radio station in Los Angeles. FCC 82M-2746, released September 13, 1982. On November 12, Faith filed a motion to disqualify the Review Board, which was

later supplemented. This motion will be denied. See para. 10 below. In accordance with past practice the Board has carefully reviewed the record to insure that the presiding officer acted reasonably and was guided by Commission precedent in striking the balance between the need to protect the integrity of the hearing process and individual rights while insuring that scarce broadcast facilities are licensed to the best qualified applicants. *See Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 171 (Rev. Bd. 1982); *Sco-Kim, Inc.*, FCC 2d 960, 963 (Rev. Bd. 1982), *rev. denied* FCC 82-463, released October 28, 1982. A unanimous Review Board has decided to affirm the dismissal of the renewal application for the reasons discussed below, paras. 13-17.

Background

2. On April 22, 1982, Faith Center's application for renewal of its FM radio station in Los Angeles, California was consolidated for hearing with the competing applications of Inspiration Media and Coronado Broadcasting by Commission Memorandum Opinion and Order, FCC 82-186.

3. In its order the Commission noted that in 1978 Faith Center's license for San Bernardino television station KHOF-TV had been set for hearing "to determine whether Faith Center, Inc. had conducted fraudulent over-the-air fund raising and refused to cooperate with Commission investigators." FCC 82-186, para. 21. These issues were never resolved because the San Bernardo television renewal application was dismissed with prejudice for failure to prosecute by failing to respond to valid discovery orders.[1]

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[1] See *Faith Center, Inc. KHOF-(TV)*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81-235 (1981), *aff'd sub. nom. Faith Center, Inc.* v. *FCC*, D.C. Cir. Nos. 81-1648 and 1649, April 7, 1982, *reconsideration and rehearing en banc denied* June 22, 1982.

4. In the hearing order, the Commission also noted that in 1980 the same issues were designated against another of Faith's television stations in Hartford, Connecticut, but again were not resolved because the Commission subsequently approved a distress sale proposed by Faith. *Id.* Accordingly, in this proceeding those issues were specified against its Los Angeles FM radio station:

To determine with respect to Faith Center, Inc.:

a. All the facts and circumstances surrounding Faith Center, Inc.'s failure to permit Commission access to certain licensee books, records and employees in connection with BC Docket No. 78-326. [Note 1 below]

b. Whether Faith Center, Inc., failed to submit information requested by the Commission in the Commission's letter dated June 15, 1978.

c. Whether in its over-the-air fund raising broadcasts on KHOF-TV, Faith Center, Inc., violated or is in violation of, Title 18, United States U.S.C. Section 1343.

An issue was also specified to determine which of three applicants, on a comparative basis, would best serve the public interest. *See Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982).

5. A pre-hearing conference was held on June 17, 1982, nearly two months after the application had been designated for hearing. Tr. 1-67. In response to a question from the Administrative Law Judge, Faith Center's counsel indicated that it would not comply with discovery or deposition requirements in the proceeding:

> Judge Kuhlmann: If you are telling me right now that you do not intend to comply with the discovery requests of the Bureau again and that you

do not intend to participate in this proceeding or follow my orders in this proceeding, then state so right now. Mr. Roberson.

Mr. Roberson: On constitutional grounds I would like to do so.

Judge Kuhlman: You do not intend to?

Mr. Roberson: On constitutional grounds, thats correct. (Tr. 11)

In response to another question Faith's counsel indicated that its president, its officers, and board of directors would not be made available for depositions in the proceedings. Tr. 33-35. After reminding counsel of the serious consequences of the previous failure to participate in discovery in the San Bernardino proceeding the ALJ gave Faith an additional ten days to submit a brief setting forth its constitutional arguments. A 32 page brief entitled "Constitutional Issues" was filed by Faith on June 30, 1982, to which was attached Faith's 35 page "The Theology of Giving," which had been previously submitted in the San Bernardino proceeding. On July 13, the Broadcast Bureau filed its Comments on Constitutional Issues.[2]

6. Meanwhile the Broadcast Bureau had proceeded with discovery and on June 17, filed a motion for production of documents. Faith opposed this motion on June 30, and in a Memorandum Opinion and Order, FCC 82M-2108, released July 8, the Administrative Law Judge considered Faith's objections and then ordered

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[2] On June 30, 1982, Faith also filed (1) a Motion to disqualify the ALJ pursuant to 5 U.S.C. 556; requesting that administrative guidelines for disqualification of ALJ be promulgated, and in the alternative, motion for evidentiary hearing, and (2) "Motion to recuse the Broadcast Bureau or in the alternative a voir dire hearing to ascertain the facts surrounding the Broadcast Bureau's misconduct." Those motions were denied by Memoradnum Opinion and Order, FCC 82M-2375, released August 3, 1982, which also considered Faith's constitutional arguments.

it to produce the documents by July 15, 1982. The Bureau also propounded written interrogatories on June 17. Faith did not respond, but it did seek an extension of time until July 15, 1982 to respond. By Memorandum Opinion and Order, FCC 82M-2175, the ALJ granted the motion for extension of time. Thus, July 15 was established as the date for Faith to produce the documents and to respond to the Bureau's interrogatories.

7. On the due date Faith did not produce any of the requested documents nor did it provide the information requested in the interrogatories. On July 22, it did file a late "Response to Broadcast Bureau's interrogatories proposed June 17, 1982." The Bureau, which did not consider the pleading responsive, then moved to compel a response on August 9, 1982. On the other hand, the competing applicants, Inspiration Media and Coronado Broadcasting, filed a joint motion to dismiss Faith's application on August 18, 1982.

8. The motion to dismiss relied on Faith's pre-hearing conference statement that it would not comply with discovery and the fact that it had now failed to comply. Although Faith sought to justify its refusal to respond on constitutional grounds, the competing applicants referred to the ALJ's previous rulings that the constitutional arguments had been considered and rejected by the Commission citing FCC 82M-2108, released July 8, 1982; Tr. 6-7, 10, 12-13. Moreover, the Commission's decision had been affirmed by the Court which stated: "This Court is in agreement with the result reached by the Commission generally for the reasons given by it in *Faith Center, Inc.*, 82 FCC 2d 1 (1980)." (See Note 1, above.) This motion to dismiss was granted by the ALJ in a Memorandum Opinion and Order, FCC 82M-2746, released September 13, 1982; Faith's renewal application for its Los Angeles FM radio station was dismissed; and the Bureau's motion to compel was dismissed as moot. And this appeal followed.

DISCUSSION

9. The issue may emerge in perspective if we dispose of some preliminary matters (minor nuisances) which distract attention from the real controversy. These matters include Faith's motion to disqualify the Review Board, the ALJ, and recuse the Bureau; Faith's alleged use of "scandalous language" in some pleadings, and its failure to properly file a supplemental renewal application.

10. On October 27, 1982, the Board ruled on Faith's motion to exceed the five page limitation on its appeal. In that ruling, the Board is alleged to have prejudged the merits of this appeal, relied impermissibly on the unpublished decision of the D.C. Circuit Court in the San Bernardino proceeding, and was vague about the relevancy of certain issues which Faith desired to raise. Ordinarily, this type of appeal shall be filed *five* days after the release date of the offending order, and shall be confined to *five* pages. 47 CFR 1.301(c)(3) and (5). Here the Board granted Faith two extensions of time totally some forty-four days to prepare its appeal. Faith also requested that it be allowed to file a fifty instead of a five page appeal as contemplated by the rules. We granted leave to file a fifteen page appeal. Our action in extending both the time and the page limitation was designed to afford Faith ample time and enough space so that its counsel could refine the issues and sharpen its arguments as the case advanced through the adjudicatory process. We did not grant Faith all the space it requested because experience teaches that while more time may assist parties in refining and sharpening their pleadings, overly generous limits on space seem to tug them in the opposite direction. See Judge McGowan's *Judicial Review of Administrative Action*, 20 Ad. Law Rev. 169-174 (1967) and *Gross Telecasting, Inc.*, FCC 82R-63, 92 FCC 2d 204, released November 10, 1982, 52 RR 2d 851, 853 note 3. Nor did we prejudge or

improperly intend to limit the scope of Faith's appeal when, ruling on the request for extension of time, we stated specifically that "[*W*]*ithout deciding the matter at this time, it appears* to the Board that a number of these questions have been resolved previously in the proceeding in which the D.C. Circuit Court of Appeals affirmed the Commission's dismissal of Faith Center, Inc.'s KHOF-TV renewal application. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81-235 (1981). In addition, other matters you list do not *appear* to be within the scope of the issues discussed and decided in the order that is being appealed." (Emphasis added) We did cite a published Commission decision and noted the Court's affirmance. It is neither novel nor impermissible for this Board to take cognizance of related and pertinent Commission actions. On the contrary, we are obliged by statute, rules, and past practice to follow and apply Commission precedent, and cannot make new policy, or modify old policy. *See Horne Industries, Inc.*, FCC 82R-68, 91 FCC 2d 1193, released November 26, 1982, paras. 1, 9. Accordingly, we will not disqualify ourselves.

11. The ALJ's dismissal order should be reversed, Faith tells us, because he failed to disqualify himself, or certify the matter to the Commission. (Appeal, paras. 2-10). In a companion case involving the renewal hearing of Faith's San Francisco television station, the same ALJ did certify Faith's disqualification request to the Commission. *See Faith Center, Inc.*, FCC 82-533, released December 10, 1982. In that certification to the Commission "the ALJ incorporated the reasons stated in his ordes rejecting virtually identical" disqualification requests in our Los Angeles proceeding. FCC 82-533, para. 6. After considering Faith's arguments in considerable detail the Commission recently found them to be totally without merit. *Id.*, para. 21. That reasoning and ruling is equally applicable here. The refusal

to recuse the Broadcast Bureau is also challenged (Appeal paras. 11-15), but we agree with the ALJ's ruling on this point, (Note 2 above, FCC 82M-2375, at paras. 7-9). His reasoning closely parallels that of the Commission in the San Bernardino proceeding, 82 FCC 2d at 31-32.

12. Faith contests the rulings that its counsel used scandalous language in its pleadings (Appeal para. 16-20, and *Anti-Defamation League* v. *FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968)) and failed to file a supplemental renewal application as required by the Commission (Appeal at paras. 21-27). In reviewing the record we have found that the motion to dismiss which the ALJ granted did not rely on these two points. These matters are not essential to the ALJ's ruling, or to our disposition of Faith's appeal, and this Board in no way rests on these grounds. We now turn to the heart of the matter and the real issue.

13. This confrontation began half a decade ago when Faith first refused, on constitutional grounds, to respond to Commission requests for documents, videotapes, and other information. It was later warned that a continuing refusal would lead to a renewal hearing. *See Faith Center, Inc.*, 69 FCC 2d 1123, 1127 (1978). The Commission then designated Faith's San Bernardino license renewal for hearing in 1978 leading to the dismissal of that application in 1981 for failure to produce the requested information during discovery and the Court's affirmance of the Commission's decision in 1982. Faith's renewal application of its Hartford television station was designated for hearing in 1980. Again the information was not produced because the Commission approved Faith's request for a distress sale. See para. 4 above.

14. The present case which involves the license renewal of a third station licensed to Faith, an FM radio station in Los Angeles, takes on a complicating dimen-

sion because of the presence of two competing applications filed in 1977 and 1980. Competing applicants are entitled to a speedy and thorough comparative hearing to establish which is the best qualified proposal. *See Central Florida Enterprises, Inc.* v. *FCC, supra.* After a delay of several years the Los Angeles renewal and the competing applications were consolidated for a comparative hearing in April of 1982. The parties were given ample notice to prepare for the prehearing conferences on June 17, 1982. At that conference Faith's counsel candidly announced that it would continue to stand on its constitutional arguments and not participate in the discovery phase of the case. Nor would it produce relevant witnesses for depositions. In response to several written Bureau requests, interrogatories, and ALJ discovery orders, Faith in fact did not produce the requested information, even after its time for responding was extended to July 15.

15. At this point in the litigation, some four months after the case had been set for hearing, Faith's competitors on August 18, 1982 moved to dismiss for failure to prosecute, citing 47 CFR 73.3568. Under these circumstances, the ALJ's order granting the motion to dismiss was reasonable, within his discretion, and fully consistent with agency precedent and practice. *See Pan American Broadcasting, supra,* 89 FCC 2d at 170-171, and *Sco-Kim, Inc., supra,* 90 FCC 2d at 963. The other applicants in this case were entitled to a prompt resolution of both the basic and comparative qualifications of all applications. *See Fidelity Television, Inc.* v. *FCC,* 502 F.2d 443 (D.C. Cir. 1974) and 515 F.2d 684 (D.C. Cir. 1975).

16. A proper balance was struck in this case between the need to protect the integrity of the hearing process and individual rights while insuring that scarce broadcast facilities are granted to the best applicants. Faith was afforded several opportunities by the ALJ to make its constitutional arguments orally and in writing. When

it became crystal clear that Faith would not participate in discovery, an important procedural device for expediting resolution of hearings. *Pan American Broadcasting, supra*, 89 FCC 2d at 170, the ALJ acted in a reasonable manner when he granted the motion to dismiss. Faith's refusal to participate in prehearing discovery frustrated the efforts of the ALJ and other parties to proceed with the trial of this case in a timely fashion. It justified the dismissal of the application for failure to prosecute, and "reasonable discretion must be vested in the officer who guides the course of the proceedings." *N.L.R.B.* v. *Phaostron Instrument*, 344 F.2d 917, 920 (9th Cir. 1965).

17. At the heart of Faith's appeal to us, paras. 28-46, is a concise summary of the constitutional argument which it fully articulated before the ALJ in its 32 page constitutional brief and related document "Theology of Giving." These arguments have been compared with the arguments considered and rejected by the Commission in the San Bernardino proceeding. See 82 FCC 2d at 17-21. Our own analysis has convinced us that Faith's competitors, the Bureau, and the ALJ are correct. The Commission has previously ruled on the basic constitutional arguments, and this Board is obliged to follow such prior Commission precedent, para. 10 above. However, Faith has preserved its point both at the hearing and in this appeal. It can now move to higher authorities which have full discretion to re-examine Faith's arguments. 47 CFR 1.115 and 47 U.S.C. 402(b); see also McGowan, *Judicial Review of Administrative Action, supra*, 20 Ad.Law Rev. at 173. While the applicants are free to continue this litigation, they can also attempt to settle their differences. And Congress has recently recognized that settlements can serve both the private and public interests. *See* Sections 311(c) and 311(d) of the Communications Act as amended; Conference Report, No. 97-765, 97 Cong. 2d Sess. pp. 49-50; Matthew 5, 22-26.

18. ACCORDINGLY, IT IS ORDERED, That the Motion to Disqualify the Review Board filed November 12, and supplemented November 18, 1982 by Faith Center, Inc. IS DENIED; and its Appeal, filed November 4, 1982, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH A. MARINO, *Chairman, Review Board.*

APPENDIX G

Memorandum Opinion and Order of the Administrative Law Judge in the San Francisco Proceeding

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FCC 83M-970

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BC Docket No. 82-339
File Nos. BRCT-711 and BRCT-801015KE

IN RE APPLICATIONS OF FAITH CENTER, INC.

For Renewal of License for Station KVOF-TV
San Francisco, California

BC Docket No. 82-340
File No. BPCT-810113KI

WEST COAST UNITED BROADCASTING CO.
San Francisco, California

BC Docket No. 82-341
File No. BPCT-810115KE

TOGETHER MEDIA MINISTRIES
San Francisco, California

BC Docket No. 82-342
File No. BPCT-810115KF

LDA COMMUNICATIONS, INC.
San Francisco, California

For Construction Permit

MEMORANDUM OPINION AND ORDER

Issued: March 22, 1983; Released: March 24, 1983

1. Under consideration are the Motion to Dismiss [the application for Renewal of Faith Center, Inc.] filed February 23, 1983 by Together Media Ministries; Mass Media Bureau's Second Motion for the Production of Documents by Faith Center, Inc., filed March 3, 1983; LDA Motion for a Second Order to Compel Faith Center to comply with Discovery Orders, filed March 2, 1983; Request for Permission to File Appeal, filed January 17, 1983 by Faith Center, Inc.; Supplement to Request to File Appeal, filed January 19, 1983 by Faith Center, Inc.; LDA Petitions to Enlarge Issues Against Faith Center, filed August 27, 1982; Request for Withdrawal of Presiding Officer, filed February 10, 1983 by Faith Center, Inc.; and Exception to Ruling of Nondisqualification Re: Request for Withdrawal of Presiding Officer, filed February 14, 1983 by Faith Center, Inc.

2. On December 16, 1982, Together Media Ministries filed interrogatories directed to Faith Center, Inc. which Faith Center has never answered. In addition, on the same date Together Media Ministries filed a request for documents from Faith Center which was granted on January 6, 1983. *Order*, FCC 83M-87, released January 7, 1983. Faith Center has also failed to produce the documents. Faith Center's failure to respond to these requests is the basis of Together Media Ministries' motion to dismiss.

3. Faith Center's response to Together Media Ministries' motion to dismiss is not illuminating about why the documents have not been produced or why the interrogatories have not been answered. Instead, Faith Center argues that the requests for documents and interrogatories were improperly served, although it concedes it received the requests in December shortly after they were filed with the Commission. To this date Faith Center has

continued to argue about technical compliance with the original service by Together Media Ministries while choosing to ignore the fact that it has received the requests. Nevertheless, while arguing that it is, in effect, "legally unaware" of what documents it has been ordered to produce, it reviewed the request it purportedly does not possess and told Together Media Ministries that the documents could be found in KVOF-TV's public file. Together Media Ministries, after being subjected to what appears to be Faith Center's version of a wild goose chase, discovered that since 1977 KVOF-TV has had no public file. The facts related in the pleadings by Faith Center and Together Media Ministries exhibit a continuing deception by Faith Center and its counsel with regard to the whereabouts of KVOF-TV's records, to say nothing about the newly raised issue of its failure to maintain a public file for six years.

4. In addition, Faith Center, on January 31, 1983, was directed (*Order*, FCC 83M-390) to respond to the interrogatories of the Mass Media Bureau and LDA Communications. It has not responded to this order either. With regard to LDA's September 30, 1982 interrogatories, Faith Center was originally directed (*Order*, FCC 82M-3882, released December 7, 1982) to answer them by December 21, 1982. Faith Center did not and, on January 20, 1983, it was again directed to answer LDA's interrogatories within 10 days. *Memorandum Opinion and Order*, FCC 83M-390, released January 31, 1983. On March 2, 1983, LDA requested another order directing Faith Center to answer. In addition, LDA states that Faith Center did not comply with the the order to produce the documents it had requested. See *Order*, FCC 82M-3882, *supra*. LDA also states that Faith Center principals did not appear for scheduled depositions on February 18, 1983, although they had been directed to do so. *Memorandum Opinion and Order*, FCC 83M-390, *supra*.

* * * *

6. The first paragraph of this memorandum lists a number of pending pleadings regarding Faith Center. Each is now moot except the latest of Faith Center's requests to disqualify the Presiding Judge, and that request, like the ones that preceded it, is being stricken from the record as sham and false. Section 1.52, 47 C.F.R. § 1.52 (1982). Overall it might do well to remind Faith Center of what the Commission has said about pleadings like those it has filed in this proceeding:

> [U]nfounded, intemperate and irresponsible charges cannot be countenanced. In fact, such conduct must be condemned if we are to maintain respect for the administrative process and for the official actions of those charged with the responsibility for administering the law. *Telecable Corp.*, 18 F.C.C. 2d 276, 477-78 (1969).

ACCORDINGLY, IT IS ORDERED that the Mass Media Bureau's Second Motion for the Production of Documents by Faith Center, Inc., filed March 3, 1983; LDA Motion for a Second Order to Compel Faith Center to Comply with Discovery Orders, filed March 2, 1983; Request for Permission to File Appeal, filed January 17, 1983 by Faith Center, Inc., and supplemented January 19, 1983; and LDA Petitions to Enlarge Issues Against Faith Center, filed August 27, 1982 ARE DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the Request for Withdrawal of Presiding Officer, filed February 10, 1983 by Faith Center, Inc. IS STRICKEN FROM THE RECORD.

IT IS FURTHER ORDERED that the Exception to Ruling of Nondisqualification Re: Request for Withdrawal of Presiding Officer, filed February 14, 1983 by Faith Center, Inc. IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the Motion to Dismiss, filed February 23, 1983 by Together Media Minis-

tries IS GRANTED and the application of Faith Center, Inc. for renewal of license for KVOF-TV, San Francisco, California IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Edward J. Kuhlmann
EDWARD J. KULMANN
Administrative Law Judge

APPENDIX H

Memorandum Opinion and Order of the Administrative Law Judge in the Los Angeles Proceeding

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FCC 82M-2746

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BC Docket No. 82-212
File No. BRH-826

IN RE APPLICATIONS OF FAITH CENTER, INC.

For Renewal of License for Station KHOF (FM)
Los Angeles, California

BC Docket No. 82-213
File No. BPH-10774

INSPIRATION MEDIA OF SOUTHERN CALIFORNIA, INC.
Los Angeles, California

BC Docket No. 82-214
File No. BPH-801103AM

CORONADO BROADCASTING OF SOUTHERN CALIFORNIA, INC.
Los Angeles, California

For Construction Permits

MEMORANDUM OPINION AND ORDER

Issued: September 9, 1982; Released: September 13, 1982

1. Under consideration are the Motion to Dismiss Application of Faith Center, Inc., filed August 18, 1982 by Inspiration Media of Southern California and Coronado Broadcasting of Southern California, Inc., and the Broadcast Bureau's Motion to Compel, filed August 9, 1982.

2. From the outset, Faith Center has sought to disrupt this proceeding and refused to participate in discovery. It has sought to scandalize the administrative process; has, without support, attacked the ethics of the Broadcast Bureau; has refused to comply with the filing rules and orders of the presiding judge; and has accused the presiding judge of bias, which it has asserted in terms that are anti-Semitic. Overall these actions of Faith Center have exhibited bad faith and a disdain for fair play.

3. Before the proceeding had even begun, Faith Center described the proceeding in scandalous language. The first paragraph of its Opposition to Broadcast Bureau's Motion for Production of Documents of June 17, 1982, filed June 30, 1982, which reads as follows, transmits the full flavor of the tenor of Faith Center's pleadings:

> "Mock trials," star chamber proceedings, and kangaroo courts are not unique in the history of mankind. Their methods and procedures are not unique either. Find a disreputable witness willing to perjure himself, find a prosecutor determined to convict or destroy instead of determining truth, and find a court with participants willing to use the process to rationalize a pre-ordained goal, rather than guaranteeing justice or fair play; give the above parties unlimited funds, resources and personnel to achieve their dastardly and unconscionable

purposes and the outcome is certain: A crucifixion occurs in the name of high-sounding public duty.

4. These are highly emotional and serious claims to have made in a proceeding that had had, at the time it was stated, only a prehearing conference. They become all the more troublesome because they are mere shouts without support and, apparently, were stated for no other reason than to scandalize and disrupt.

5. Repeatedly, Faith Center has sought to vilify the discovery requests of the Broadcast Bureau and its counsel. It describes the Commission as "going to bed with liars and perjury practicing outcasts." [1]

6. The Commission's purpose in holding this hearing is characterized as a vendetta. *Id.* at 4. "The judge is the paid executioner for an agency determined to do this church in; the prosecutor [sic] is a fellow traveler and participant with perjuring ex-dissidents; and this hearing is but a kangaroo court to find new rationales for doing what is already pre-determined . . . ." *Id.* at 8.[2]

7. In its most recent pleading, Response to Broadcast Bureau's Motion to Compel, filed August 19, 1982, at 3, Faith Center conjectures in an anti-Semitic assertion that the presiding judge and, by association, the Broadcast Bureau have made Faith Center "the target of Jewish invective and religious bias . . . ." [3]

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[1] Opposition to the Broadcast Bureau's Motion for Production of Documents of June 17, 1982, at 3.

[2] The Bureau requested in interrogatory 51 that Faith Center identify Anouska Fricker. Faith Center's cryptic response was that "[t]his interrogatory is a revelation of the erotic sickness and morbid curiosity of the attorney for the Broadcast Bureau . . . ." Response to the Broadcast Bureau's Interrogatories Propounded June 17, 1982, filed July 22, 1982 by Faith Center, at 45.

[3] Faith Center has previously stated anti-Semitic beliefs at least twice. It likened the Broadcast Bureau's actions to "a heartless band of self-righteous Jews" and it explained that the Bureau's

8. Faith Center has also refused to comply with the filing rules and, because of its position, it is unclear what it has filed. Its basis for this contention is that a Commission staff member in the Commission Secretary's office told Faith Center it need file only two copies. The presiding judge explained the requirements of the rule to Faith Center, all to no avail. In no case has Faith Center's unwillingness to comply with the filing rules caused greater disruption than with its claimed filing of its supplemental renewal form. Although it maintains it has filed the form, the record establishes the contrary view.

9. In the *Designation Order* the Commission directed Faith Center to file a supplementary renewal form by May 23, 1982. When Faith Center was asked at the prehearing if the supplemental form had been filed the following colloquoy took place (Tr. 15):

> Counsel for Faith Center: No, we have not.
>
> Presiding Judge: You realize the day has come and gone for that? That you [had] 30 days?
>
> Counsel for Faith Center: That is correct.
>
> Presiding Judge: Why haven't you done so?
>
> Counsel for Faith Center: Because this Court [sic] has no jurisdiction to review the matters; this Court has no—there is no requirement under any statute or rule that such a supplemental is required.

10. On June 22, 1982, it was pointed out to Faith Center that the Commission had already explained, in the *Designation Order*, the source of its authority for such a request. *Memorandum Opinion and Order*, FCC 82M-

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actions here demonstrated that the Bureau is like "the Jews, and the mob [because it] felt more comfortable with Barabbas and Judas . . . ." Opposition to Broadcast Bureau Motion for Production of Documents of June 17, 1982, at 2, 11.

1965, released June 22, 1982. Faith Center was then directed to demonstrate why its renewal application should not be dismissed for failing to file its supplementary renewal form. *Id.* On June 30, 1982, Faith Center filed a statement about why it did not need to file the form and allegedly attached to that pleading part of a renewal form. (The pleading itself made no mention of the attachment, although attached was a "Declaration of Edward L. Masry" which said it was being filed concurrently. However, neither the presiding judge nor any of the parties received a copy.)

11. The Broadcast Bureau, in its motion to compel filed August 9, 1982, and Inspiration Media and Coronado Broadcasting, in their motion to dismiss filed August 18, 1982, pointed out that they had seen no evidence that Faith Center had filed the supplemental renewal form. Then, certainly to everyone's surprise, Faith Center included a copy of a supplemental renewal form with its opposition to the Bureau's motion to compel, filed August 19, 1982. Faith Center claimed to have filed the form on July 30, 1982 and it termed the statements that it had not filed one "[t]he Bureau's next lie."[4]

12. The most that can be said in Faith Center's favor on this matter is that it may have filed a copy with the Commission's Secretary on June 30—a document which was due two and a half years earlier—but there is no evidence it filed the required number of copies or that it served copies on the Bureau and the competing parties. Moreover, the application form submitted does not provide in substantial respects the information called for in paragraphs 12, 14, 15, and 16. It can only be concluded that Faith Center is substantially in non-compliance with the Commission's order.

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[4] Response to Broadcast Bureau's Motion to Compel, filed August 19, 1982, at 3.

13. *The Motion to Compel:* The Broadcast Bureau has made two discovery requests of Faith Center: It asked for an order directing Faith Center to provide, for inspection, documents relating to the operation of KHOF-TV.[5] And it propounded to Faith Center fifty-six interrogatories requiring written answers.[6] The Broadcast Bureau characterizes Faith Center's response to its discovery requests as one which "has provided no real answers . . . ."[7] Faith Center's failure to respond to the Bureau's discovery requests also serves as one of the reasons for the motion to dismiss by the competing parties.

14. The Bureau asked that Faith Center supply any documents it referred to in answering the Bureau's interrogatories; records or documents which reflected money received or spent from the solicitation of funds by Dr. Eugene Scott over KHOF-TV from September 1976 through August 1977; documents pertaining to the initiation, completion and payment for projects for which funds were solicited by Dr. Scott over KHOF-TV during September 1976 through August 1977; copies of the pledges made by Dr. Scott and evidence that the pledges were fulfilled; and video tapes of the "Festival of Faith" programs for September 1976 through November 1976. The Bureau urged that these documents were reasonably calculated to lead to the discovery of admissible evidence about the pending issues, which include misrepresentation, abuse of process, intimidation of witnesses and fraudulent solicitation of funds.

15. Because Faith Center had refused all requests for documents in the KHOF-TV proceeding, there was some concern initially about whether Faith Center would com-

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[5] Broadcast Bureau's Motion for Production of Documents, filed June 17, 1982.

[6] Broadcast Bureau's Interrogatories, filed June 17, 1982.

[7] Broadcast Bureau's Motion to Compel, filed August 9, 1982, at 3.

ply with a request for documents or answer interrogatories. In this respect, it should be noted that all documents requested in this proceeding by the Bureau were sought by Commission investigators in September 1977, five years ago, and continuously since that time by members of the Hearing Division of the Broadcast Bureau. See *Faith Center, Inc.*, 69 F.C.C. 2d 1123 (1978); *Faith Center, Inc.*, 82 F.C.C. 2d 1 (1980). Faith Center has raised a variety of objections to providing the documents, each of which has been the subject of considerable review by the Commission and U.S. Court of Appeals for the District of Columbia, and, in all respects currently relevant, its objections have not been found meritorious. On June 17, 1982, at the prehearing conference when Faith Center was asked whether it would provide the long sought documents, it stated that it would not. Tr. 11.

16. Moreover, when Faith Center was asked whether it would comply with discovery requests, participate in the proceeding, and follow orders of the presiding judge, it stated that, on constitutional grounds, it would not do so. Tr. 11, 35, 43, 44, 45. Faith Center argued that the Commission's consideration of the issues about KHOF-TV was unconstitutional. Tr. 6.[8]

17. The Broadcast Bureau's June 17, 1982 Motion for Production of Documents was totally opposed by Faith Center. It objected to producing documents identified in the interrogatories because it had not answered the interrogatories. At the time the statement was made, Faith Center's response was a non sequitur. Certainly a party acting in good faith would not have objected to providing documents identified in its answers to interrogatories, since answering an interrogatory presumes the information is properly sought.

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[8] See also, Opposition to Broadcast Bureau's Motion for Production of Documents of June 17, 1982, filed June 30, 1982 by Faith Center, at 10. ("Faith Center is not willing any longer to participate in a mock trial in which a corrupt agency . . . sits in judgment . . . .")

18. In its opposition to providing financial records about Dr. Scott's solicitations, Faith Center flatly stated that: "Faith Center will not reveal its records of any contributions . . . ." [9] This statement appears to have been made independently of Faith Center's argument that the Constitution permitted it to withhold the fund raising documents, and its objections that the request was overbroad, conclusionary, and amounted to a fishing expedition.

19. The Bureau requested copies of pledges made by Dr. Scott and evidence that the pledges were fulfilled. Faith Center objected to providing the documents as follows: "Dr. Scott has informed Faith Center that he will not voluntarily produce said pledges. Until Dr. Scott is willing to produce said pledges to Faith Center, Faith Center does not have to decided [sic] whether or not, if Dr. Scott produced the pledges to Faith Center, Faith Center would produce the same for the Broadcast Bureau." [10] Despite its ability to give this response, Faith Center believed that the request was ambiguous, unintelligible, and uncertain.[11]

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[9] Opposition to Broadcast Bureau's Motion for Production at part 2, 2. [This pleading, inexplicably, is numbered in two parts, 1-12 and then 1-6, references to part 2 are separately identified, all other page references are to part 1.]

[10] *Id.* Opposition at part 2, 6.

[11] In its interrogatory 35 propounded to Faith Center, the Bureau points out that "[i]n its August 17, 1979 response to Bureau interrogatories (page 4), Faith refers to '. . . Gene Scott's contribution records . . . .'" Broadcast Bureau's Interrogatories, filed June 17, 1982, at 10. And, when asked to identify each Scott contribution record and give its location, Faith Center responded without any problem "that any contribution records by Dr. Eugene Scott to this church represent sacred contributions required to be maintained in secret by the theological creed of this church as commanded by Matthew 6, the words of Jesus, and as such represent a confidential, privileged secret and contractual privacy, protected by the United States Constitution and contract rights. Dr. Gene Scott as a con-

20. The request for production of the "Festival of Faith" tapes was objected to because, "Faith Center does not have those tapes. As a consequence, Faith Center cannot produce them." [12] This last objection merely restates what Faith Center has maintained since 1977. The issue now is why it cannot produce them. The Commission noted that it had reason to believe that Faith Center or Dr. Scott may be in a position to obtain the tapes since they had been given to the Wescott Christian Center. 69 F.C.C. 2d at 1127. While Faith Center now urges that this statement of the Commission is a "lie," [13] it has not disagreed with the Commission finding that "Faith's own answers to the Bureau's interrogatories indicate that Dr. Scott routinely inspected the requested financial records possessed by Wescott and Dr. Scott himself appears to concede he exercised physical control over at least some of the video tapes in question." 82 F.C.C. 2d, at 28 (Footnote omitted).

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tributor to this church is entitled to the right to practice his religious response to the creed of this church to give in secret according to Matthew 6 equal to the right of any rank and file member practicing that creed." Response to the Broadcast Bureau's Interrogatories Propounded June 17, 1982, filed July 22, 1982 by Faith Center, at 37. Under these circumstances, there is little question that Faith Center's argument that the request is ambiguous, unintelligible, and uncertain is no more than a makeweight argument made in bad faith.

[12] *Id.*

[13] "The Broadcast Bureau and the FCC know and have repeatedly been told that all Festival of Faith tapes are not in the possession of Faith Center *and never were.* In its By-direction letter of June, 1978, the FCC lied when it said Faith had 'given' the tapes to a sister church. Faith never, ever owned the tapes and never, ever was in the position or capacity to 'give' tapes to a sister church which already owned them. Faith cannot respond to Interrogatory #21 because it has no tapes and never did have." (Emphasis in original.) Response to the Broadcast Bureau's Interrogatories Propounded June 17, 1982, at 34.

21. In fact the last time the Commission reviewed Faith's response to this request, it found that "Dr. Scott concedes that some of the tapes were kept in an employee's apartment at Scott's direction." 82 F.C.C. 2d at 30, n. 89. The Commission also pointed out that Dr. W. Eugene Scott serves as the president and pastor of Faith and Wescott and the president of the Full Gospel Fellowship of Churches to which both Faith and Wescott belong. 82 F.C.C. 2d at 2. Fiven his history, Faith Center's statement, in response to the request for the tapes, that it did not have them, is evasive and dishonest.[14]

22. Faith Center has refused to directly respond to any of the interrogatories.[15] While it has stated any number of reasons for not answering, the thrust of its main argument is that because Faith Center is both a licensee and a church, its church functions must always prevail. Accordingly, it asserts the primacy of its church functions as prohibiting any answer to the Bureau's requests. Moreover, it maintains, throughout its objections, that it has the right to determine what is church business not subject to Commission review. All of the questions asked by the Bureau—each of which appear relevant to the hearing issues and appear reasonably calculated to lead to discovery of admissible evidence—were rejected

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[14] "A party may not unreasonably ignore information available to it from outside sources or fail to make good faith attempts to obtain such information." 82 F.C.C. 2d at 27.

[15] Faith Center has with its objections provided some information in response to the interrogatories. The Broadcast Bureau finds Faith Center's responses unreliable because Faith Center has not been willing to state under oath that the information is an accurate response to the question. Faith Center also submitted the earlier answers it gave in December 1979 to some of the same questions asked here by the Bureau. This too, the Bureau urges is untrustworthy because the affidavit of Dr. Scott refers to another set of answers and not the ones to which it is attached.

out of hand and ended with Faith Center directing the Bureau to "Go to Hell." [16]

23. It is apparent that regardless of the merits of any of Faith Center's arguments about such matters as repetitiousness or vagueness that, if an interrogatory was rewritten or clarified, Faith Center would still refuse to answer. Furthermore, Faith Center's general arguments for withholding information have all been considered and rejected by the Commission and it could not now make them again in good faith.[17]

24. In refusing to answer many of the interrogatories Faith Center now alleges that it could not supply the documents if it wanted to because in August, 1981 its records were "stolen." Whether the documents were stolen earlier in this proceeding, or simply removed to avoid scrutiny, is, of course, at issue. In considering the first theft, the Commission found that "Dr. Scott apparently concedes that documents and tapes were removed from the state of California." 82 F.C.C. 2d at 38. But these documents were not taken in any traditional sense of the word in Dr. Scott's mind. "Scott explains this as fulfilling his commitment to preserve this material from government encroachment, a threat which he foresaw

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[16] Response to the Broadcast Bureau's Interrogatories Propounded June 17, 1982, at 52.

[17] Faith Center has argued that some of its constitutional arguments are different from those made in the KHOF-TV proceeding (Tr. 19), but while it makes the claim, it points to only one: "the Broadcast Bureau's violation of Faith Center's right to seek redress of government guaranteed by the First Amendment." Response to the Broadcast Bureau's June 17, 1982, Request to Faith Center, Inc. For Documents, at 2. (There is no record of this pleading having been filed with the Secretary of the Commission, although it was served on the presiding judge on July 14, 1982.) However, this constitutional argument is of little moment since it is based on a false factual premise. *See* Tr. 27-32; *Memorandum Opinion and Order*, FCC 82M-2375, released August 3, 1982, at ¶s 4-9; *Faith Center, Inc.*, 82 F.C.C. 2d 1, 32-33 (1980).

based on California state government actions against other religious groups." *Id.*

25. Faith Center has provided no substantiation of its assertion of theft. Given the past history of document loss and its own representations in December 1979 that it did not have the documents requested,[18] its current unsupported assertion is inherently improbable.

26. *The Motion to Dismiss:* The motion to dismiss, submitted by both of the competing applicants, is premised on Faith Center's refusal to answer the interrogatories, provide documents, comply with orders of the Commission, and file the supplement to its renewal form. The Broadcast Bureau supports the motion and Faith Center has not opposed it. The moving parties, Inspiration Media and Coronado, point out that Faith Center stated it would not cooperate with this hearing (Tr. 11, 34-35) and that it has, in fact, not cooperated.

27. There is little doubt that Faith Center is not prosecuting its application in good faith and that the proper course is to dismiss. It has done everything within its means to make a shamble of this proceeding and thwart the Commission in fulfilling its statutory "duty to examine the licensee's execution of the public interest mandate." *Golden Broadcasting Systems, Inc.*, 68 F.C.C. 2d, 1099, 1108 (1978). The retention of an existing licensee is a privilege which must be earned and it is up to the renewal licensee to present its record. *Id.*[19]

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[18] See Response to the Broadcast Bureau's Second Interrogatories attached as Exhibit A to Response to the Broadcast Bureau's Interrogatories Propounded June 17, 1982, filed July 22, 1982 by Faith Center. (In this document, allegedly prepared and filed December 1979, Faith Center maintained that the documents were held by employees, Dr. Scott, and Wescott Christian Center.)

[19] Faith Center has maintained, almost from the outset, that along with the Commission and the Broadcast Bureau, the presiding judge is biased against it and ought to disqualify himself. Faith Center has had some difficulty articulating the merits of its con-

ACCORDINGLY, IT IS ORDERED that the motion to compel filed August 9, 1982 by the Broadcast Bureau IS DISMISSED as moot.

IT IS FURTHER ORDERED that the motion to dismiss filed August 18, 1982 by Inspiration Media of Southern California, Inc. and Coronado Broadcasting of Southern California, Inc. IS GRANTED and the appli-

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tention (See Motion to Disqualify Administrative Law Judge Edward J. Kuhlmann Pursuant to 5 U.S.C. 556; Motion Requesting Administrative Guidelines for Disqualification of Administrative Law Judge Be Promulgated; and in the Alternative Motion for Evidentiary Hearing, filed June 30, 1982) because, primarily, it was not aware of the procedural rule governing disqualification and it failed to perfect its filing (See *Memorandum Opinion and Order*, FCC 82M-2375, released August 3, 1982) and because, secondarily its reason for raising the question is its belief that the proceeding is not going its way and this improper premise does not satisfy the legal requirements for withdrawal. See Supplemental Memorandum re: Motion to Disqualify Judge Kuhlmann, filed, filed July 30, 1982; Exception to Ruling of Nondisqualification, filed August 10, 1982; Supplemental Pleading to Exception to Ruling of Nondisqualification, filed August 17, 1982; and *Order*, FCC 82M-2632, released August 27, 1982. As the previously filed motions to compel and dismiss were being considered Faith Center filed, on September 3, 1982, another Request for Withdrawal of the Presiding Officer and, on September 7, 1982, yet another pleading entitled Request for Withdrawal of Presiding Officer and Exception to Ruling of Nondisqualification Re: Request for Withdrawal of Presiding Officer These pleadings are moot in light of the action dismissing its application. Faith Center has used these requests as a means of having its "legal arguments" reviewed one more time. Faith Center stated this view directly in its Response to Broadcast Bureaus' Motion to Compel, filed August 19, 1982, when it objected to the presiding judge acting before the issues contained in its "documents" were determined by the Commission. The documents, as best as can be determined, are every pleading filed in this proceeding and a whole lot more, many of which defy categorization. See *Order*, FCC 82M-2632, released August 27, 1982, at 2 for a partial listing. Thus, because its motion for withdrawal of the presiding judge attempts to disrupt the proceeding at some cost to the other parties and the public interest, it will not be addressed again.

cation of Faith Center, Inc. for renewal of license for Station KHOF-FM, Los Angeles, California IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Edward J. Kuhlmann
EDWARD J. KUHLMANN
Administrative Law Judge

APPENDIX I

Order of the Court of Appeals Denying Rehearing in the San Francisco Proceeding

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 84-1085

FAITH CENTER, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION
And Consolidated Case No. 84-1086

[Filed July 8, 1985]

Before: Edwards and Starr, Circuit Judges; and Gesell, District Judge for the District of Columbia

ORDER

Upon consideration of appellant Faith Center, Inc.'s petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX J

Order of the Court of Appeals Denying Rehearing in the Los Angeles Proceeding

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2295

FAITH CENTER, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION

[Filed July 2, 1985]

Before: Edwards and Starr, Circuit Judges; and Gesell, U.S. District Judge for the District of Columbia

ORDER

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-527

In the Supreme Court of the United States

OCTOBER TERM, 1985

FAITH CENTER, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Communications Commission properly exercised its discretion in dismissing renewal applications for broadcast licenses because the licensee (a religious organization) failed to comply with discovery orders for information relevant to an inquiry into allegations of fraudulent solicitation of funds which, if substantiated, could have disqualified the renewal applicant.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-527

FAITH CENTER, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the Federal Communications Commission denying review are unreported and are set forth at Pet. App. 5a-12a. The judgments of the court of appeals affirming those orders without opinion are unreported and are set forth at Pet. App. 1a-4a.

JURISDICTION

The judgments below (Pet. App. 1a-4a) were entered on May 9, 1985. Rehearing in the Los Angeles proceeding was denied on July 2, 1985 (Pet. App. 53a); rehearing in the San Francisco proceeding was denied on July 8, 1985 (Pet. App. 52a). The petition for a writ of certiorari was filed on September 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case challenges the dismissal by the Federal Communications Commission (FCC) of the renewal applications for two of petitioner's broadcast licenses.[1] The FCC has previously dismissed a renewal application for another broadcast license held by petitioner on the same grounds. See *Faith Center, Inc. Station KHOF-TV*, 82 F.C.C. 2d 1 (1980), reconsideration denied, No. FCC 81-835 (May 12, 1981), aff'd by judgment, 679 F.2d 261 (D.C. Cir. 1982) (Table), cert. denied, 459 U.S. 1203 (1983) [hereinafter cited as the San Bernardino proceeding].

1. In 1977, the FCC began an investigation into the broadcast operations of a television station licensed to petitioner after it had received allegations from a former employee of petitioner that the licensee had solicited funds over-the-air which were not used for the purposes described in the broadcasts. The investigation was necessary to determine whether petitioner had violated the federal wire fraud statute, 18 U.S.C. 1343, which prohibits the use of broadcast facilities for the purpose of carrying out "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises."[2] After petitioner failed to cooperate in the investigation, the FCC designated for hearing petitioner's renewal application for its San Bernardino station, KHOF-TV. See 47 U.S.C. 309(a) and (e). Petitioner refused to supply information in response to discovery orders that would have aided in resolving the questions concerning its

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[1] In addition to being a broadcast licensee, petitioner is a non-denominational Christian church headquartered in California.

[2] The FCC has authority, pursuant to Section 312(a)(6) of the Communications Act, 47 U.S.C. 312(a)(6), to determine whether a broadcast station has violated 18 U.S.C. 1343.

qualifications to be a broadcast licensee.[3] Consequently, the FCC dismissed petitioner's renewal application. *Faith Center, Inc. Station KHOF-TV, supra.*

In its opinion, the FCC considered at length petitioner's arguments that the Constitution forbade the FCC's inquiry into its broadcast operations. 82 F.C.C. 2d at 17-21.[4] The FCC observed that, by seeking and obtaining a broadcast license, petitioner had subjected itself to the same public interest obligations under which any broadcast licensee, religious or otherwise, operates. 82 F.C.C. 2d at 20, citing *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). Moreover, the FCC noted that "solicitation, as a form of conduct, may be subject to government regulation of numerous types including regulation designed to prevent fraud on the public." 82 F.C.C. 2d at 18, citing *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940).

The court of appeals affirmed the FCC's decision without opinion (679 F.2d 261 (D.C. Cir. 1982)), and this Court denied certiorari (459 U.S. 1203 (1983)).

2. Since the FCC had been unable in the San Bernardino proceeding to resolve the questions concerning petitioner's qualifications to be a licensee, it designated for hearing petitioner's renewal applications for its Los Angeles radio

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[3]The FCC, through its Broadcast Bureau, sought, inter alia, videotapes of the programs on which funds were solicited, accounts receivable ledgers, lists of solicitations and moneys received, and records of money spent on each project for which funds were solicited.

[4]The FCC had also addressed petitioner's constitutional objections during the pre-hearing investigation. 69 F.C.C. 2d 1123, 1126-1127 (1978).

station, 89 F.C.C. 2d 1054 (1982), and San Francisco television station, 90 F.C.C. 2d 519 (1982).[5] At the pre-hearing conference in the Los Angeles proceeding, petitioner's counsel stated that it would not comply with discovery or deposition requirements in the proceeding (83-2295 C.A. App. 28). Petitioner also indicated that it would not make its president, officers or directors available for depositions (83-2295 C.A. App. 51-52). The administrative law judge warned petitioner that failure to participate in discovery could result in disqualification, as in the San Bernardino proceeding (83-2295 C.A. App. 32, 62, 65), but he nonetheless gave petitioner an opportunity to file a brief setting forth its constitutional arguments.[6]

Petitioner's subsequent actions in the Los Angeles and San Francisco proceedings confirmed the position it took at the pre-hearing conference that it would not comply with discovery orders. In the course of those proceedings, the FCC's Broadcast Bureau sought from petitioner the same information it had unsuccessfully sought in the San Bernardino proceeding, including the videotapes of broadcasts containing solicitations for funds (83-2295 C.A. App. 105); (84-1085 C.A. App. 5061).[7] The responses received (83-2295 C.A. App. 936-1203, 1342-1373; 84-1085 C.A. App. 5378-5899) were simply resubmissions of the information submitted in the San Bernardino case (without even changes in the

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[5]In contrast to the San Bernardino case, which involved only petitioner, each of the two new proceedings also involved competing applicants for the frequencies. See *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

[6]Petitioner filed that brief on June 30, 1982 (83-2295 C.A. App. 675).

[7]The FCC also sought additional information relating to misrepresentation and abuse of process issues arising out of petitioner's actions in the San Bernardino proceeding (83-2295 C.A. App. 96-101; 84-1085 C.A. App. 5067). Petitioner never submitted information responsive to these issues.

captions), where the FCC had determined, with court approval, that petitioner's response was inadequate.[8] Thus, consistent with the result in the San Bernardino proceeding, the FCC dismissed petitioner's renewal applications for these two stations (Pet. App. 5a, 7a).

The court of appeals affirmed the FCC in both cases, again without opinion (Pet. App. 1a, 3a).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with the decisions of this Court or any other court. To the contrary, the decisions are entirely consistent with earlier cases involving the obligations of a broadcast licensee, including the decision in the San Bernadino case involving petitioner's similar lack of compliance with FCC orders. Thus, this case does not warrant further review.

Petitioner contends here, as it did in the San Bernardino case, that the FCC dismissed its renewal applications in violation of its First Amendment right to the free exercise of religion. The Court denied the petition for a writ of certiorari in the San Bernardino case, and neither petitioner nor the intervenors supporting the petition have identified anything in the instant cases—which involve precisely the same behavior by petitioner and the same action by the FCC—to warrant a different outcome here.

Petitioner's claim is, in any event, without merit. This Court stated in *United States* v. *Lee*, 455 U.S. 252, 261 (1982):

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[8] In this Court, Intervenor Scott, in asserting that Faith Center "cooperated fully with the FCC" (at 7), relies on part of the joint appendix in the San Bernardino proceeding that Faith Center refiled in the San Francisco case (84-1085 C.A. App. 1707-1874); the depositions of Faith Center's attorneys, to which Scott also refers (at 8), were taken by counsel for Faith Center in the San Bernardino proceeding (84-1085 C.A. App. 3320, 3747).

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in the activity.

Applying that principle to the particular context involved here:

> A religious group, like any other, may buy and operate a licensed radio or television station. * * * But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations."

King's Garden, Inc. v. *FCC*, 498 F.2d at 60, quoting *Office of Communication* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). Those obligations include the duty to cooperate with an FCC investigation undertaken after the Commission had received complaints that funds solicited over-the-air for identified projects were in fact not used for those projects. See 18 U.S.C. 1343; 47 U.S.C. 312(a)(6). This cooperation was necessary because once serious public interest questions were raised concerning petitioner's operations, the FCC had an affirmative duty to resolve them before it could determine whether the license renewal applications could be granted. 47 U.S.C. 309(a) and (e).[9]

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[9]The Ninth Circuit, in a suit brought by petitioner's president, has held that the FCC's inquiry served a compelling government interest in preventing diversion of funds obtained through the use of the public airwaves, and that the investigation "was narrow and avoided any unnecessary interference with the free exercise of religion." *Scott* v. *Rosenberg*, 702 F.2d 1263-1274, 1275 (9th Cir. 1983), cert. denied, 465 U.S. 1078 (1984). Although Intervenors (Johnson at 12; Scott at 6, Wescott at 9) now suggest that the information the Commssion received did not provide a sufficient basis to initiate an inquiry, the Ninth Circuit specifically determined in that case that the Commission had sufficient reliable information to justify its inquiry. 702 F.2d at 1275.

Petitioner erroneously implies that this case involved the loss of a broadcast license solely because of the licensee's unwillingness, on religious grounds, to divulge the names of donors (Pet. 16-17). The FCC never required petitioner to disclose the names of members of the public who contributed funds to it (see Pet. App. 10a; 82 F.C.C. 2d at 3 n.6; 69 F.C.C. 2d at 1127 n.1). In fact, the FCC's Broadcast Bureau, whose discovery requests petitioner claims sought such information, specifically disclaimed any present intention of requiring the disclosure of donors' names (83-2295 C.A. App. 1612, 2667).[10] But even if we assume arguendo that the Bureau's interrogatories could be construed to have sought the names of donors, petitioner would still not be entitled to relief. Virtually all of the relevant discovery requests concerned information that clearly did not require the disclosure of the names of donors (see note 3, *supra*), yet petitioner failed to respond adequately to any of the information requests.[11] Thus, this is not a case in which a

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[10]Petitioner (Pet. 10-11) and Intervenor Scott (at 12) contends that Faith Center offered to provide certain documents to the FCC with the names of donors deleted. They rely for this contention on an affidavit from an individual who was neither a party nor counsel to a party, executed months after the FCC proceedings had ended, in which the affiant alleges that, in a private meeting with the Broadcast Bureau, the Bureau rejected the affiant's attempt to settle the case by arranging for the submission of edited documents (83-2295 C.A. App. 2947). If petitioner was indeed willing to disclose certain relevant information on condition that donor names be deleted, and if, in its view, the Bureau wrongly rejected its offer, it should have raised this matter before the ALJ for a determination by him whether the offer was sufficiently responsive to the Bureau's discovery requests. Petitioner, however, never brought its alleged offer to the attention of the ALJ, nor to the attention of the Commission itself. See 47 U.S.C. 405. Moreover, the information which petitioner now claims it was willing to disclose under certain protective conditions was only a small part of the materials petitioner had refused to disclose.

[11]For example, the videotapes of programs on which broadcast solicitations were made would not require petitioner to reveal confidential names of donors, yet were particularly relevant to a determination of

broadcaster otherwise cooperated with the FCC and invoked the First Amendment solely for the limited purpose of withholding donor records from the FCC. Instead, petitioner "was playing the dodger to serious charges." *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 238 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

Petitioner also contends that it should have been afforded an opportunity to obtain a ruling on its constitutional claims prior to the imposition of sanctions (Pet. 17, 20). This assertion overlooks the thorough consideration of petitioner's arguments in the San Bernardino proceeding, not only before the FCC (69 F.C.C. 2d at 1126-1127; 82 F.C.C. 2d at 17-21), but also in a full proceeding in the court of appeals and a petition for certiorari in this Court.[12] Thus,

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what, if any, specific use was promised for the funds received—the obvious starting point for an inquiry into whether the funds were then spent for those specified purposes.

Intervenor Wescott suggests (at 10) that Faith Center was not obliged to turn over the videotapes because they were in Wescott's possession, and Wescott would not release the tapes to Faith Center. In light of the facts that (1) Dr. Scott was president of both Faith Center and Wescott (82 F.C.C. 2d at 28), (2) Faith Center and Wescott had the same officers and directors until midway through discovery in the San Bernardino proceeding (*id.* at 30 n.88), and (3) Dr. Scott appeared to have exercised physical control over at least some of the tapes in issue—including ordering that they be placed in an employee's appartment to avoid their being obtained by the FCC (*id.* at 28, 37-39)—the Commission in the San Bernardino decision properly rejected this line of reasoning as a "bad faith contrivance" (*id.* at 27).

Intervenor Wescott also asserts (at 10) that Faith Center did deliver certain videotapes to the FCC in the San Bernardino proceeding. But in the Los Angeles and San Francisco proceedings, the Commission sought videotapes of programs broadcast on specific dates (83-2295 C.A. App. 99, 105; 84-1095 C.A. App. 5067, 5062); those tapes were never produced (83-2295 C.A. App. 1607).

[12]In addition, more than twenty lawsuits have been filed in connection with some aspect of the FCC's actions by petitioner, its president or its members. To date, nineteen have been finally resolved, all of them unfavorably to petitioner.

any doubt concerning the obligation of petitioner, an applicant for renewal of its broadcast license, to cooperate with the FCC's efforts to determine whether renewal was warranted was put to rest well before the dismissals of petitioner's Los Angeles and San Francisco applications.[13] In any event, this Court has repeatedly recognized that dismissal is proper when a party to a proceeding refuses to comply with discovery orders. See, *e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962).[14]

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[13]The Los Angeles and San Francisco proceedings were not initiated until after the court of appeals affirmed the dismissal of petitioner's San Bernardino renewal application for failing to supply information necessary to an informed decision on whether the public interest would be served by a grant of the application. Petitioner's application for Commission review of the dismissal of its Los Angeles application was filed more than three months after the Court denied certiorari in the San Bernardino case, and contained no indication that petitioner would change its position (83-2295 C.A. App. 2649). The ALJ's dismissal of the San Francisco application was not issued until a month after certiorari was denied in the San Bernardino case. Thus, petitioner had ample opportunity, after this Court's determination that the constitutional claims were not worthy of review, to abandon its previous resistance and follow a more cooperative course.

[14]The Commission has on a number of occasions in the past dismissed applications because the applicant has failed to comply with discovery requirements. See, *e.g., Vue-Metrics, Inc.*, 69 F.C.C. 2d 1049 (1978), aff'd by judgment, 615 F.2d 1369 (D.C. Cir. 1980) (Table); *Fletcher Broadcasting Corp.*, 41 Rad. Reg. 2d (P & F) 638 (1977); *J.B. Broadcasting*, 70 F.C.C. 2d 217 (Rev. Bd. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

DOJ-1985-11

No. 85-527

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FAITH CENTER, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION, WEST COAST UNITED BROADCASTING COMPANY, WESCOTT CHRISTIAN CENTER, DR. W. EUGENE SCOTT, LUCILLE E. JOHNSTON, and NEW INSPIRATION BROADCASTING CO., INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF RESPONDENT OPPOSING CERTIORARI

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Pursuant to Supreme Court Rule 28.1, New Inspiration Broadcasting Co., Inc., states that it is owned 80% by Inspiration Media of Southern California, Inc., and 20% by Coronado Broadcasting of Southern California, Inc., and that none of the companies have any other parents, subsidiaries, or affiliates.

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Respondents.

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MEMORANDUM OF RESPONDENT OPPOSING CERTIORARI

Respondent New Inspiration Broadcasting Co., Inc., represents to the Court as follows:

Petitioner has not presented any grounds warranting grant of a writ of certiorari. This Court has already had occasion to consider and reject petitioner's claims. In *Faith Center, Inc. v. FCC,* 459 U.S. 1203 (1983), this Court denied review of *Faith Center, Inc. v. FCC,* 679 F.2d 261 (D.C. Cir. 1982), where the Court, in a brief *per curiam* order, affirmed the Federal Communications Commission's dismissal of petitioner's renewal application for KHOF-TV, San Bernardino, California, for failure to

respond to legitimate discovery concerning whether petitioner had violated the federal wire fraud statute, 18 U.S.C. §1343. *Faith Center, Inc.* (KHOF-TV), 82 FCC 2d 1 (1980), *recon. den.* FCC 81-835 (May 12, 1981).

Petitioner has not shown how the instant matter is any different, and indeed petitioner cannot show how the matter is any different since the petitioner, the discovery, and the refusal to respond to the discovery are virtually the same. Accordingly, the result must also be the same.

Therefore, the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FAITH CENTER, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

WESCOTT CHRISTIAN CENTER,

Intervenor-
Respondent.

BRIEF OF INTERVENOR-RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the religion clauses of the First Amendment require the Federal Communications Commission to afford Faith Center, Inc., a religious broadcaster, a hearing on its claims that responding to discovery requests would violate the tenets of the church and the religious beliefs of its adherents, prior to imposing sanctions for Faith Center's refusal to respond.

2. Whether Faith Center, Inc., a religious broadcaster, could properly refuse to comply with discovery demands on the ground that they were overbroad and thus threatened the free exercise of its religious beliefs, and the beliefs of its members.

PARTIES INVOLVED

The parties involved in this petition are Faith Center, Inc., petitioner, and the Federal Communications Commission, respondent. Petitioner Faith Center, Inc. has no parent companies or subsidiaries, within the meaning of Sup. Ct. R. 28.1. Wescott Christian Center and Full Gospel Fellowship of Churches and Ministers International, of both of which Dr. w. euGene Scott is president, may be affiliates, within the meaning of the rule.

The following individuals and corporations were parties in the court below and are respondents in this Court pursuant to Sup. Ct. R. 19.6: West Coast United Broadcasting Company, Wescott Christian Center, Dr. w. euGene Scott, Lucille E. Johnston, and New Inspiration Broadcasting Co., Inc.*

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* As explained more fully below, this

petition seeks review of two cases: District of Columbia Circuit Nos. 84-1085 and 83-2295. West Coast United Broadcasting Company was an intervenor in case No. 84-1085. Wescott Christian Center, Dr. w. euGene Scott, Lucille E. Johnston, and New Inspiration Broadcasting Co., Inc. were intervenors in case No. 83-2295.

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OCTOBER TERM, 1985

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WESCOTT CHRISTIAN CENTER,

Intervenor-
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joining with the petitioner, Faith Center, Inc., Intervenor-Respondent, Wescott

Christian Center respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on May 9, 1985.

OPINIONS BELOW

The per curiam order and judgment of the court of appeals in its case No. 84-1085 ("the San Francisco proceeding") is unreported and is set forth in Appendix A, pp. 1a-2a of Faith Center's Petition. The per curiam order and judgment of the court of appeals in its Case No. 83-2295 ("the Los Angeles proceeding") is unreported and is set forth in Appendix B, pp 3a-4a of Faith Center's Petition. The order of the Federal Communications Commission in the San Francisco proceeding is unreported and appears in Appendix C, pp 5a-6a of Faith Center's Petition. The order of the Federal Communications Commission in the Los

Angeles proceeding is unreported and appears in Appendix D, pp. 7a-14a of Faith Center's Petition. The Memorandum Opinion and Order of the Review Board in the San Francisco proceeding is reported at 94 F.C.C. 2d 756 and appears in Appendix E, pp. 15a-21a of Faith Center's Petition. The Memorandum Opinion and Order of the Review Board in the Los Angeles proceeding is reported at 92 F.C.C. 2d 1255 and appears in Appendix F, pp. 22a-32a of Faith Center's Petition. The Memorandum Opinion and Order of the Administrative Law Judge in the San Francisco proceeding is unreported and appears in Appendix G, pp. 33a-37a of Faith Center's Petition. The Memorandum Opinion and Order of the Administrative Law Judge in the Los Angeles Proceeding is unreported and appears in Appendix H, pp. 38a-51a of Faith Center's Petition.

JURISDICTION

The judgments below in both the San Francisco and the Los Angeles proceedings were entered on May 9, 1985. (App. A and B, pp 1a-3a of Faith Center's Petition.) A timely petition for rehearing in the San Francisco proceeding was denied on July 8, 1985. (App. I, p. 52a of Faith Center's Petition) A timely petition for rehearing and suggestion for rehearing en banc in the Los Angeles proceeding was denied on July 2, 1985. (App. J, p. 53a of Faith Center's Petition) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Intervenor-Respondent Wescott Christian Center appears pursuant to Sup. Ct. R. 19.6.

CONSTITUTIONAL PROVISION INVOLVED

The religion clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

U.S. Const. amend. I.

STATEMENT

In this case the Federal Communications Commission ("FCC" or "Commission") dismissed a church's application for renewal of a radio broadcast license and a television broadcast license, the reason given being, in the Commission's words, the Church's "failure to prosecute" the applications. (App. F, p. 31a of Faith Center's Petition) The failure to prosecute occurred when the church, Faith Center, Inc., refused to comply with broad and sweeping discovery orders which it believes contravene the First Amendment rights of the church and its adherents.

Relationship Between Petitioner, Faith Center, Inc. and Intervenor-Respondent.

Intervenor-Respondent, Wescott Christian Center, a California non-profit church

corporation, (hereafter, "Wescott"), is not now, nor has it ever been a licensee of the Federal Communications Commission (hereafter, FCC.) It has intervened in the proceedings below to protect its own property rights, and the constitutional rights of its sister church, Faith Center, which is a separate and distinct California non-profit church corporation.

Wescott was incorporated on July 19, 1963, establishing its worship center and its principle offices in Oroville, California. From its corporate beginning, Dr. W. Eugene Scott has served as an Associate Pastor to his father, W. T. Scott, Senior Pastor of Wescott's Congregation.

During the next decade of its existence, Wescott expanded its Ministry to the entire world. Its expansion was based on the growing reputation of Dr. Scott as a Christian teacher and businessman. Sister churches

from Anaheim, California to Australia called upon him to preach and to consult with their leaders on both temporal and spiritual problems. Under Dr. Scott's leadership, Wescott grew and prospered.

In 1975, Dr. Scott was asked by the Board of a sister church, Petitioner, Faith Center, to assist in solving a seemingly insoluable problem. Because of the illness of Faith Center's then Pastor, Rev. R. Schoch, and exceptionally bad management by the officers who acted for him, Faith Center found itself with four million dollars of current liabilities, an inventory of obsolete broadcasting equipment and liquid assets of less than $20,000. The advice sought from Dr. Scott was on how to handle the Church's bankruptcy.

Dr. Scott was also asked to preach to the Congregation, but his message was not on bankruptcy but on Faith, acting in Faith;

living in Faith. The response to the sermon was an invitation to become Pastor of Faith Center.

Dr. Scott had little desire to exchange the Pastorate of a successful church for that of a failing one, and the request was initially refused. After a great deal of thought and prayer, the offer was accepted, but with conditions. One condition was to assure the fiscal integrity of Wescott. Faith Center proposed to take from Wescott its main asset: the services and skill of Dr. Scott. It was therefore agreed that while Wescott would assist Faith Center in its crisis, all videotapes of Dr. Scott's teachings were to be and remain Wescott's property. The condition was accepted, and Faith Center has at no time ever owned or had control over videotapes of any of Dr. Scott's programs.

As set forth at length in the Petition of Faith Center, after an unverified complaint by one fired ex-cameraman, the FCC began its prosecution of that FCC licensee. Faith Center cooperated with the FCC to clear the charges providing invoices, receipts and affidavits refuting the charges. For religious reasons, Faith Center would not, however, accede to the demand for the delivery of names of donors to FCC investigators. For common sense reasons, Faith Center could not deliver to the FCC what it did not own: the videotapes of Dr. Scott's teachings. For these two refusals, one based on the strongly held belief that donations were to be given in secret (Matthew 6:1-4), and one based on the Commandment, "Thou shall not steal," the FCC will, without intervention of this Court, strip Faith Center of its broadcast licenses.

From the time of its first demand, the

FCC was placed on notice that the tapes in question were the property of Wescott and could not be delivered without the permission of Wescott's Board. That Board, noting that its investment in the tape stock, exclusive of the value of Dr. Scott's teachings recorded thereon, was in excess of $700,000, was somewhat reluctant to deliver such a large part of its assets over to a governmental agency with no guarantee of return or even safekeeping. This reluctance was augmented by the fact that the investigators admitted that they had not bothered to review the twenty reels of 2" video tape owned by Faith Center and delivered to them on the first day of the investigation. The reason for this was lack of interest and any equipment upon which to play 2" tapes. In spite of this, Wescott stated to the FCC that it would abide by any subpoena which the FCC might issue under Title 47 U.S.C.

§1.222. The FCC refused to issue the subpoena maintaining, as it has maintained all along, that because Dr. Scott was President of both organizations, it was bad faith to refuse to turn over the property of Wescott for the benefit of Faith Center.

It is a settled matter of law that corporations are separate entities and the sharing of officers or directors does not destroy the corporate entity. Penwalt v. Plough, Inc., 85 F. R. D. 257 (D.C. Del. 1979). For the FCC to attempt to force Faith Center to convert property it did not own on pain of loss of license is only one of a train of abuses by this agency.

CONCLUSION

Wescott was made a part of this license proceeding even though Wescott is not a licensee, its true corporate nature and its religious purposes were distorted and assassinated, and its rights were violated

by an abusive attempt to treat this valid church organization as though it did not have a real and substantial existence, all of which said treatment was done with no findings of fact.' By such activities, Faith was unjustly punished because of actions performed by Wescott, a non-licensee, and Wescott's rights under the constitution and the laws of the State of California were ignored by the actions of the FCC in its unlimited extension of jurisdiction over this non-licensee church.

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Respondent.

BRIEF OF INTERVENOR-RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the religion clauses of the First Amendment require the Federal Communications Commission to afford Faith Center, Inc., a religious broadcaster, a hearing on its claims that responding to discovery requests would violate the tenets of the church and the religious beliefs of its adherents, prior to imposing sanctions for Faith Center's refusal to respond.

2. Whether Faith Center, Inc., a religious broadcaster, could properly refuse to comply with discovery demands on the ground that they were overbroad and thus threatened the free exercise of its religious beliefs, and the beliefs of its members.

PARTIES INVOLVED

The parties involved in this petition are Faith Center, Inc., petitioner, and the Federal Communications Commission, respondent. Petitioner Faith Center, Inc. has no parent companies or subsidiaries, within the meaning of Sup. Ct. R. 28.1. Wescott Christian Center and Full Gospel Fellowship of Churches and Ministers International, of both of which Dr. w. euGene Scott is president, may be affiliates, within the meaning of the rule.

The following individuals and corporations were parties in the court below and are respondents in this Court pursuant to Sup. Ct. R. 19.6: West Coast United Broadcasting Company, Wescott Christian Center, Dr. w. euGene Scott, Lucille E. Johnston, and New Inspiration Broadcasting Co., Inc.*

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* As explained more fully below, this

petition seeks review of two cases: District of Columbia Circuit Nos. 84-1085 and 83-2295. West Coast United Broadcasting Company was an intervenor in case No. 84-1085. Wescott Christian Center, Dr. w. euGene Scott, Lucille E. Johnston, and New Inspiration Broadcasting Co., Inc. were intervenors in case No. 83-2295.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-527

FAITH CENTER, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

DR. w. euGENE SCOTT,

Intervenor-
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joining with the petitioner, Faith Center, Inc., Intervenor-Respondent Dr. w. euGene Scott respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on May 9, 1985.

OPINIONS BELOW

The per curiam order and judgment of the court of appeals in its case No. 84-1085 ("the San Francisco proceeding") is unreported and is set forth in Appendix A, pp. 1a-2a of Faith Center's Petition. The per curiam order and judgment of the court of appeals in its Case No. 83-2295 ("the Los Angeles proceeding") is unreported and is set forth in Appendix B, pp. 3a-4a of Faith Center's Petition. The order of the Federal Communications Commission in the San Francisco proceeding is unreported and appears in Appendix C, pp. 5a-6a of Faith

Center's Petition. The order of the Federal Communications Commission in the Los Angeles proceeding is unreported and appears in Appendix D, pp. 7a-14a of Faith Center's Petition. The Memorandum Opinion and Order of the Review Board in the San Francisco proceeding is reported at 94 F.C.C. 2d 756 and appears in Appendix E, pp. 15a-21a of Faith Center's Petition. The Memorandum Opinion and Order of the Review Board in the Los Angeles proceeding is reported in 92 F.C.C. 2d 1255 and appears in Appendix F, pp. 22a-32a of Faith Center's Petition. The Memorandum Opinion and Order of the Administrative Law Judge in the San Francisco proceeding is unreported and appears in Appendix G, pp. 33a-37a of Faith Center's Petition. The Memorandum Opinion and Order of the Administrative Law Judge in the Los Angeles Proceeding is unreported and appears in Appendix H, pp. 38a-51a of Faith Center's Petition.

JURISDICTION

The judgments below in both the San Francisco and the Los Angeles proceedings were entered on May 9, 1985. (App. A and B, pp. 1a-3a of Faith Center's Petition.) A timely petition for rehearing in the San Francisco proceeding was denied on July 8, 1985. (App. I, p. 52a of Faith Center's Petition). A timely petition for rehearing and suggestion for rehearing en banc in the Los Angeles proceeding was denied on July 2, 1985. (App. J, p. 53a of Faith Center's Petition). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Interventor-Respondent Dr. w. euGene Scott appears pursuant to Sup. Ct. R. 19.6.

CONSTITUTIONAL PROVISION INVOLVED

The religion clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I.

STATEMENT

Intervenor-Respondent, Dr. w. euGene Scott, (hereafter, Dr. Scott) seeks to intervene in this proceeding for the reason that Petitioner, Faith Center, Inc., the Church which Dr. Scott Pastors, is now in jeopardy of losing all of its broadcast licenses for adhering to Christian teachings. As Pastor and teacher of the Congregation, Dr. Scott has led the fight against unwarranted government intrusion into sacred matters. Faith Center is, and has been for 38 years, a Church of congregational polity. The Congregation governs, and should the Pastor in any way violate the trust placed in him or her, the Congregation which elected that Pastor could eject that Pastor with equal ease. However, as Pastor and teacher, Dr. Scott wishes to bring the following to the attention of this honorable Court.

Stripped of the FCC's fabrications and red herrings, the facts of this proceeding

are simple. After his termination for falsifying time cards, one employee with no knowledge of the business affairs of the Church wrote one letter to the FCC in which he stated that he had seen monies raised for projects he had not seen completed. In eight years of prosecution by the FCC, no other complaints have been lodged against this licensee, and the original complainant has stated under oath that he knew of no wrongdoing at the Church during his time of tenure. Yet, the FCC without witnesses, evidence or any probable cause continues to justify their actions by quoting by rote the language of RKO General, Inc. v. FCC, 670 F.2d 215 (C.A. D.C. 1981): Petitioner "was playing the dodger to serious charges." What then are the serious charges? In RKO the serious charges to which the Court referred included by the applicant's own admission bribery, fraud, and numerous

violations of the Sherman Act. There, the applicant lost some, but not all of its licenses. The corporation remains a licensee of the FCC in a number of major cities including Los Angeles.

In the instant proceeding, Faith Center stood accused of soliciting funds to construct a "Fountain of Faith," buy studio lights and microphones and repair the roof of its building. It was further accused of not spending the funds so raised for these purposes. After eight years of intensive investigation, these charges bereft of witnesses and evidence remain the sole grounds for the FCC's persecution of Faith Center. These are the examples of "Fraud by Wire" against which the FCC must stand guard.

The Joint Appendix in this proceeding (J.A. 1707-1874 passim) shows that Faith Center cooperated fully with the FCC. Receipts, invoices, ledgers and affidavits

were delivered to this agency showing that each dollar raised, and more, was spent for its intended purpose. Faith Center sent its own attorneys at its own expense to Washington, D.C. to be deposed by FCC attorneys (J.A. 3320-3938). To any person viewing the situation objectively, and without ulterior motives, Faith Center has disproved the charges beyond any reasonable doubt. It took this burden of proof upon itself, as it might have to under some less enlightened government, and met it.

But, for reasons known only to its members, the FCC elected to remain unconvinced. When it demanded that Faith Center turn over lists of its donors including names and addresses and amounts given, the Church could not comply. Contrary to FCC allegations, Faith Center never denied its responsibilities as a licensee of the FCC, yet it did not feel in all innocence that

it should be forced to violate its Christian beliefs to abide by those responsibilities. It was willing to salute the FCC, but not willing to bow to it. The Laws of God, in the Congregation's eyes, were superior to the laws of man.

Matthew 6:1-4 commands that a donation, which is a sacrifice to God, be given in secret. To publish the gift before men is to abrogate the effect of the sacrifice. As noted in Faith Center's Petition, this concept is also part of the Talmudic tradition. In the instant context, the religious injunction has practical consequences. Faith Center's Broadcast Ministry allows the Christian message to be admitted into private homes along with the sex, violence and commercialism condoned and blessed by the FCC. Many viewers who supported the ministry had and have spouses of different faiths. Support, except in secret, could cause serious

difficulties. Further, the philosphy of this Court in such cases as N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) is applicable here.

The record shows clearly the dishonesty and shifting position of the FCC on this issue. First, the church was told after the sensitivity of the matter was brought to the FCC's attention that the records would not be required. Thereafter, the demand for these donor records was coyly included in the FCC's interrogatories. Refusal to respond to this same demand on seven separate occasions constitutes the lack of cooperation used to justify the denial of faith Center's licenses.

It was after the perfidy of the FCC was revealed by these demands that Dr. Scott began to make unfavorable comments regarding the FCC, their employees and their policies over the airwaves. This action, not any

fraud by wire or any other nebulous "serious charges" is the reason Faith Center's license renewal applications were denied. Since its inception over fifty years ago, the personnel of the FCC has been used to a very large degree of unchallenged power. Any person in possession of a broadcast license in a major metropolitan area is in possession of a gold mine. To do battle with the FCC except when caught in the commission of a crime as in RKO or when constitutional principles are involved is economic suicide. That broadcasters involve themselves in a variety of shady dealings does not surprise or shock the FCC nor does it make such persons less worthy of a broadcast license. The recent accusations against CBS and the RKO action itself bear this out. What is intolerable to the FCC is any challenge to their power. To do so, and to use their own airwaves to do so will not be permitted. Dr. Scott and Faith

Center have done so. Dr. Scott and Faith Center must be silenced.

Thus, since the on-air commentary regarding the FCC began, the FCC has engaged in a desperate attempt to find anything to justify the denial of the licenses which was a foregone conclusion. The known sensitivity of the donor records was one way, and the FCC even refused Faith Center's offer to deliver these records with the names and addresses of the donors blacked out. (J.A. 2947-2951). There has never been a hearing on the matter; never a judicial determination of the constitutional issue involved. Further, aside from the echoing song of fraud by wire, serious charges and lack of cooperation, Faith Center has been accused, groundlessly of course, of anti-semitism, newspapers throughout the country have been fed fabrications of FCC personnel, and Dr. Scott's sex life has been subjected to a

secret investigation. Yet, what are the serious charges? Where are the witnesses? There are none, and the FCC knows it. The issue, however, long ago ceased to be one of possible crime or broadcasting responsibility. The issue is now whether or not the FCC can continue to wield unlimited power free from any criticism from its licensees, free to deal with its licensees by whim, free to enjoy a master-slave relationship in the context of an otherwise democratic society.

Without the intervention of this Court, it would seem for the moment that it can. The United States Court of Appeals for the District of Columbia has stated from the bench that a broadcast license is a "favor from the government." With all the respect due to an honorable Justice, an honorable man, favors are not the stuff of which democracies are made. A government run on favors is a breeding ground of corruption. This

proceeding demonstrates that this disease has established a foothold in the FCC. Whether it continues to spread, for the time being at least, will be determined by the action of this Court. Thereafter, it will be determined by the people.

CONCLUSION

For the foregoing reasons, Intervenor-Respondent respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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No. 85-527

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FAITH CENTER, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-527

FAITH CENTER, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

This is a sad and discouraging case. It should not have arisen. And it would not have arisen if the Federal Communications Commission had been sensitive to the fundamental and delicate role that freedom of religion plays in our history and in our constitutional system, and had established procedures that would have guided its staff in giving appropriate protection to sincere and strongly-held claims of religious freedom.

I. The FCC's Position is Inconsistent with Decisions of this Court Requiring the Government to Accommodate Free Exercise Rights When the Government Has Not First Established a Compelling Interest and the Absence of a Less Restrictive Alternative

The government's Brief in Opposition underscores the need for this Court to grant review. The government's position is startlingly simple: the First Amendment does

not require any accommodation to the free exercise rights of the members of a religious group that engages in commercial activity subject to governmental regulation. (*See* Br. in Opp. at 5-6.) There is, indeed, no evidence of "commercial" activity here; the petitioner's activities were a part of its religious ministry. Moreover, the government's position is inconsistent with this Court's First Amendment decisions, which require the government to accommodate the exercise of religious rights when the government has not first established a compelling interest and the absence of a less restrictive alternative.

The government's argument—that a religious organization has no right to be treated any differently from any other party subject to a neutral government regulation, which evokes fundamental principles of equality—does have a surface appeal. Nevertheless, this Court has rejected this very position on several occasions. *See, e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). In each of these cases, this Court rejected the government's argument that the First Amendment did not require an exemption from a facially neutral governmental requirement.

These cases do not, of course, establish that any First Amendment claim warrants a special exemption. This Court has never read the First Amendment in such an absolute manner. Indeed, in certain instances, this Court has found that a particular burden on religious liberty was "essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982).[1] Because of the importance of First Amendment

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[1] The government (Br. in Opp. at 5-6) reads *Lee* far too broadly. *Lee* did not purport to overrule *Thomas, Yoder,* and *Sherbert. Lee* still requires the government to justify a burden on religious liberty. The government's position in this case, that the First Amendment does not prevent the compelled disclosure of donor records, even though such disclosure would violate petitioner's

rights, this Court, when faced with a significant burden on religious freedom, has, however, "searchingly examine[d] the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption." *Wisconsin v. Yoder*, 406 U.S. at 221. The FCC's procedures fail to satisfy these standards.

The government contends that the Commission did consider petitioner's constitutional claims. (*See* Br. in Opp. at 8.)[2] Nowhere in its opinion in the San Bernadino case, however, did the Commission discuss the constitutional issues raised by the compelled disclosure of donor records. Furthermore, nowhere in that opinion did the Commission "searchingly examine" either the burden on petitioner's free exercise rights or the claim that the government had a compelling interest in the disclosure sought. Rather, the Commission stated petitioner was required to "justif[y]" its failure to violate its religious principles and that petitioner had "not demonstrated that specific discovery requests [were] . . . irrelevant to the Commission's legitimate inquiry . . . ." *Faith Center, Inc.*, 82 F.C.C. 2d 1, 21 (1980).

The FCC's approach here was recently rejected by the Tenth Circuit in *United States v. Church of World Peace*, No. 84-2200 (10th Cir. Oct. 22, 1985). In *Church of World Peace*, an IRS summons "sought all the books, records and accounts" of the Church. The Church resisted enforcement of the summons because, *inter alia*, the sum-

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religious beliefs, and even though petitioner did not have an opportunity to obtain a ruling on its constitutional claim *prior* to the imposition of sanctions, stretches *Lee* beyond recognition.

[2] The government and respondent New Inspiration Broadcasting Co. also accord significance to this Court's denial of certiorari in the San Bernardino proceeding. This ignores the long-settled rule that "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

mons sought membership lists the Church claimed were protected by the First Amendment. The Tenth Circuit set aside enforcement of the summons as to the membership lists on First Amendment grounds because the government had not met its burden of showing a compelling need for the material. *Church of World Peace, supra*, slip op. at 2 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).[3]

As mentioned in the Petition (Pet. at 22), the broader issue—when does the First Amendment require an exemption from a facially neutral governmental requirement—is one that this Court has faced on numerous occasions, including two cases currently pending. *Goldman v. Weinberger*, 734 F.2d 1531 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 3475 (1985) (No. 84-1097); *Roy v. Cohen*, 590 F. Supp. 600 (M.D. Pa. 1984), *prob. juris. noted sub*

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[3] The courts have consistently required that First Amendment objections to discovery be considered at evidentiary hearings. In *In re First National Bank*, 701 F.2d 115 (10th Cir. 1983), the court reversed an order enforcing a grand jury subpoena and remanded for an evidentiary hearing to consider a First Amendment claim. The court stated:

> If the district court determines that enforcement of the subpoena would likely chill associational rights, the Government must show a compelling need to obtain documents identifying petitioners' members. . . . In balancing the interests involved, the court should consider whether the Government can acquire the material it ostensibly seeks by obtaining the records with the members' names deleted, or by otherwise limiting the breadth of the subpoena . . . .

701 F.2d at 119 (citations omitted). *See also Local 1814, International Longshoreman's Assoc. v. Waterfront Commission*, 667 F.2d 267 (2d Cir. 1981); *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968).

As the *Church of World Peace* case shows, Congress has recognized the problem with respect to subpoenas in tax cases in sec. 7605(c) of the Internal Revenue Code. The Federal Communications Commission should not be allowed to use a lesser standard—indeed, no standard at all.

nom. Heckler v. Roy, 105 S.Ct. 3474 (1985) (No. 84-780). There is a particular need to resolve the question in the context presented by this Petition. This Court should decide whether the government is correct in asserting that, despite the dictates of the First Amendment, the FCC has unlimited authority during the discovery stage of its investigations.

II. Because the FCC's Procedures Were Constitutionally Deficient, Petitioner Should Not Have Been Required "to Take the First Step in Such a Procedure"

The government's second argument (*see* Br. in Opp. at 7-8), which is tantamount to a waiver theory, does not address directly the overbreadth argument made by petitioner. (*See* Pet. at 19-21). The government's argument has two layers, neither of which diminishes the importance of the questions presented.

First, the government's contention that the FCC never required petitioner to disclose donors' names is amply rebutted by the Record.[4] Second, the government's position

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[4] The government's citation to two footnotes in which the Broadcast Bureau allegedly disclaimed any present intention of requiring the disclosure of donors' names is a very slender reed. This argument simply fails to explain why the issue of donor records was still a subject of dispute after the Broadcast Bureau's alleged disclaimer. (*See* D.C. No. 84-1085, Jt. App. at 2947-51 (discussing petitioner's effort to submit donor records with names and addresses deleted)). In addition, the proceedings described on pages 12-13 of the Petition, which involved petitioner's continuing efforts to resist the compelled disclosure of donor records, all post-dated the Bureau's alleged disclaimer.

The government erroneously implies (*see* Br. in Opp. at 7 (citing 82 F.C.C. 2d at 3n. 6, and 69 F.C.C. 2d at 1127 n.1)) that the FCC had a consistent policy of disclaiming an intention to seek donor names. In the San Bernardino proceeding, the Commission had initially indicated that it would follow such a position. (*See* Pet. at 10 n.8.) Nevertheless, the Bureau's later interrogatories and production requests did in fact seek donor records. (D.C. No. 84-1085, Jt. App. at 5061-5073, 6010-20; D.C. No. 83-2295, Jt. App. at 86-103.)

that petitioner is not entitled to relief because its objections went beyond the category of donor records ignores this Court's overbreadth decisions, which permit facial challenges to allegedly overbroad statutes or regulations covering both protected and unprotected activities.[5] (*See* Pet. at 19-21.) The government's analysis similarly overlooks *Speiser v. Randall*, 357 U.S. 513 (1958), in which this Court stated: "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure." *Id.* at 529.

Moreover, the Court should be aware of the sweeping nature of the demands made by the Commission's staff. There were a total of 69 interrogatories, involving 250 distinct questions. There were demands for virtually all of Faith Center's records from September 1976 "to the present." The document requests asked for "All documents identified in response to" the Mass Media Bureau's interrogatories, which were expressly made continuing. (D.C. No. 84-1085, Jt. App. at 5062, 5065, 6020.) In conjunction with interrogatories requesting such information as "the identity of the broadcast programs during which solicitations for money are/were made," the document requests required the production of all video tapes of Faith Center programs from September 1976 to the present, which covers tens of thousands of hours of broadcasting. The total value of these tapes alone, as blanks, would come to hundreds of thousands of dollars, and these tapes would be unavailable for use by the petitioner while

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[5] In *Shelton v. Tucker*, 364 U.S. 479 (1960), which invalidated an Arkansas statute with an "unlimited and indiscriminate sweep," this Court stated: "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488 (footnotes omitted).

they were in the government's custody. The requests also called for "All documents reflecting money received" from September 1976 to the present. (*Id.* at 5062.) There were numerous other interrogatories such as requests for all documents related to "the procedures followed by Faith . . . from the time the money was received in the mail room until the time it was expended," and "financial records and books." (*Id.* at 5072-73.) Together with the production requests, these interrogatories required the production of all financial records of petitioner, including all records with donor information, from September 1976 to the present.

It is plain from the record that the staff of the Commission was completely insensitive to the claims of religious freedom, and made no effort to narrow its demands. The staff undertook a general dragnet fishing expedition into all of the petitioner's activities, impinging heavily on sensitive issues of religious freedom.[6] It is apparent that the Commission staff was annoyed that petitioner raised these religious issues and that the staff "threw the book" at the petitioner. If the petitioner then got its back up, and refused to cooperate with the staff, it is hardly surprising. That has been the way of persons seeking religious freedom over a long period of history.[7]

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[6] It should be mentioned, in addition, that the government began this investigation on rather weak evidence. (*See* Brief of Intervenor-Respondent Scott at 5-7.) The courts have often looked with disfavor on broad inquiries that impinge on First Amendment rights when the government inquiry is based on "mere suspicion." *Pollard v. Roberts*, 283 F. Supp. (E.D. Ark.) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968). *Cf. Peters v. Hobby*, 349 U.S. 331, 350-52 (1955) (Douglas, J., concurring) (discussing constitutional infirmities of condemnation by "faceless informers").

[7] As a former General Counsel to the Federal Communications Commission has stated, "For our rights, our liberties, and our faiths to be protected, we must never drop our vigilance. Throughout history religious expression has had to struggle with those who would silence the message, either by design or by thoughtless action and

But, it is said that the petitioner sought a ruling from the Administrative Law Judge prematurely. The petitioner was told that it could not get a decision on its religious claims until it had complied with the discovery orders. The ALJ specifically stated that "Faith will be able to make its Constitutional arguments on the merits during the hearing," (D.C. No. 84-1085, Jt. App. at 296), which would have been, of course, *after* petitioner's religious freedom had been violated.

This procedure has continued ever since. No agency of the Commission, including the Commission itself, and no court has given the petitioner a hearing on its religious claims that disclosing donor records would violate its religious beliefs. In the Los Angeles proceeding, petitioner was even told by the ALJ that "We don't hold hearings on constitutional issues at this agency that I know of." (D.C. No. 83-2295, Jt. App. at 33.)

Here, it is the entire FCC "procedure"—or rather the lack of a procedural mechanism by which petitioner could receive a prior adjudication of its constitutional claim (*see* Pet. at 12-13)—that is constitutionally flawed. Petitioner should not have been required "to take the first step in such a procedure." *Speiser*, 357 U.S. at 529. This Court should grant review to ensure that other First Amendment claimants are not faced with the choice of violating their beliefs without first having an opportunity to obtain a ruling on their constitutional claims.

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inattention. History has not changed, and it is the duty and responsibility of every religious broadcaster, and every member of the religious community, to man the watchtowers to prevent the otherwise certain erosion of our religious liberties." Hardy & Secrest, *Religious Freedom and the Federal Communications Commission*, 16 Val. U.L. Rev. 57, 100-101 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1985